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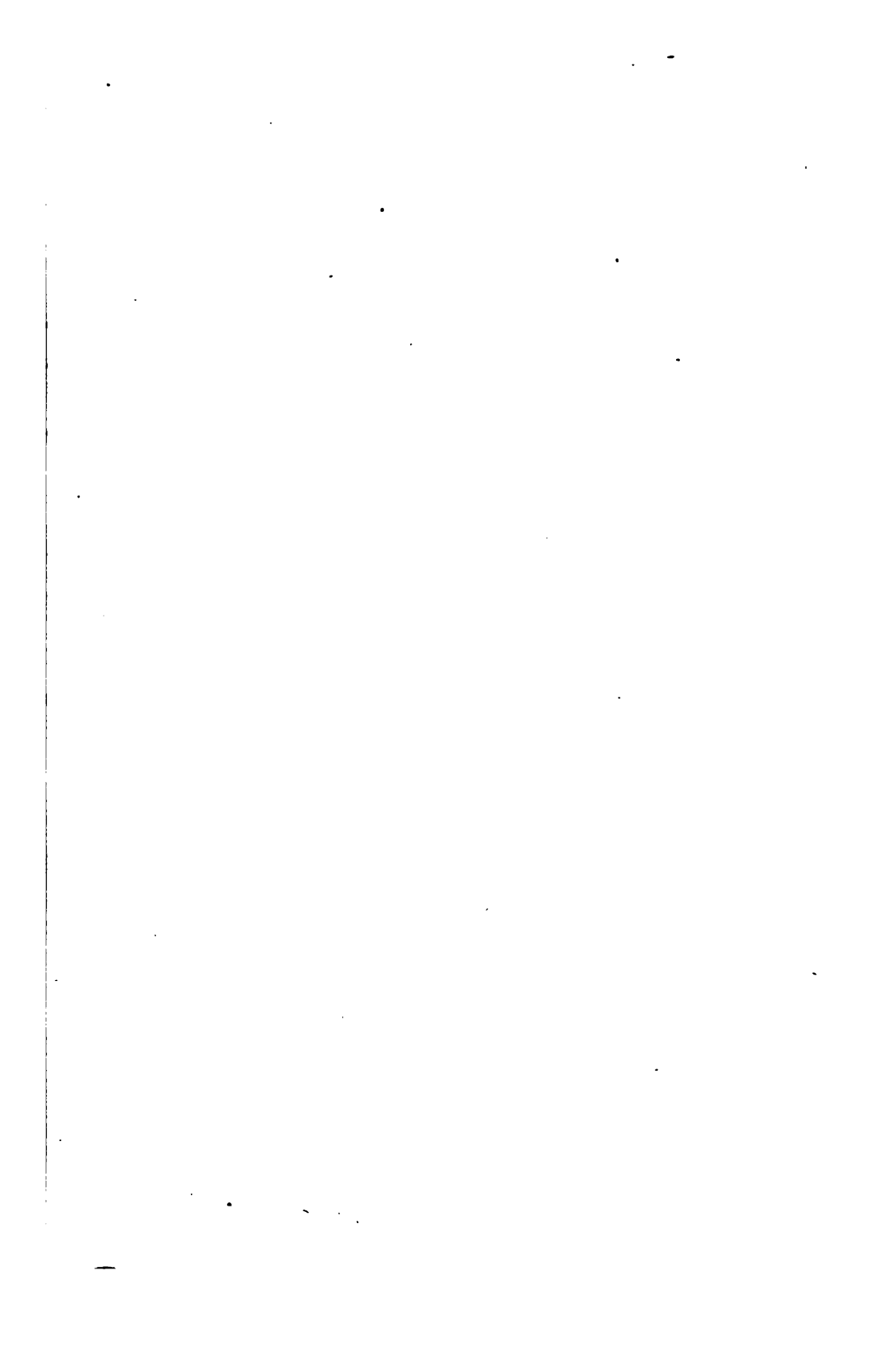
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**REPORTS**  
**OF**  
**CASES ARGUED AND DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**OF THE**  
**STATE OF MONTANA**

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**FROM MAY 16, 1918, TO APRIL 15, 1919**

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**OFFICIAL REPORT**

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**VOLUME 55**

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**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**  
**1919**

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**AUG 29 1919**

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**THE FILMER BROTHERS ELECTROTYPE COMPANY**  
**TYPOGRAPHERS AND STEREOTYPERS**

**JUSTICES**  
**OF**  
**THE SUPREME COURT OF THE STATE OF MONTANA,**  
**DURING THE TIME OF THESE REPORTS.**

---

**THE HON. THEO. BRANTLY, Chief Justice.**

<p><b>* THE HON. SYDNEY SANNER,</b> <b>THE HON. WILLIAM L. HOLLOWAY,</b> <b>† THE HON. WILLIAM T. PIGOTT,</b> <b>• THE HON. CHARLES H. COOPER,</b></p>	}	<b>Associate Justices.</b>
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**OFFICERS OF THE COURT:**

- S. CLARENCE FORD, Attorney General.**  
**FRANK WOODY, Asst. Attorney General.**  
**• R. L. MITCHELL, Asst. Attorney General.**  
**• CLARENCE N. DAVIDSON, Asst. Attorney General.**  
**ALBERT A. GEORUD, Asst. Attorney General.**  
**† I. W. CHOATE, Asst. Attorney General.**  
**• OTTO A. GERTH, Asst. Attorney General.**  
**JAMES T. CARROLL, Clerk.**  
**M. N. RACE, Marshal.**  
**A. C. SCHNEIDER, Court Stenographer.**
- 
- \* Resigned October 25, 1918.**  
**† Appointed and qualified November 14, 1918, to serve unexpired term of the Hon. Sydney Sanner, resigned.**  
**• Elected November 5, 1918; qualified January 6, 1919.**  
**† Resigned April 30, 1919.**  
**• Appointed May 1, 1919, vice R. L. Mitchell, resigned.**  
**† Appointed September 1, 1918; resigned April 7, 1919.**  
**• Appointed June 4, 1919, vice I. W. Choate, resigned.**



## **ATTORNEYS AND COUNSELORS AT LAW.**

Admitted from June 17, 1918, to June 14, 1919.

ADELSTEIN, SAMUEL I., Admitted June 24, 1918.

ALVORD, ADELBERT A., Admitted July 1, 1918.

AUSTIN, HARRY H., Admitted December 2, 1918.

BELCHER, B. B., Admitted April 17, 1919.

BOWEN, O. W., Admitted March 8, 1919.

BROWN, HARRISON, Admitted June 7, 1919.

CLAXTON, JOHN K., Admitted February 8, 1919.

DAEMS, LEONARD R., Admitted June 10, 1919.

DANIELS, PHILLIP X., Admitted June 24, 1918.

DENIGER, G. W., Admitted December 9, 1918.

FREDERICK, ROCK D., Admitted June 7, 1919.

GILLIS, W. D., Admitted January 10, 1919.

GHEIST, BAYARD S., Admitted June 2, 1919.

GLOVER, HELEN A., Admitted December 16, 1918.

HULCE, CHAS. E., Admitted June 10, 1919.

HURD, GEO. M., Admitted June 10, 1919.

KETTER, L. V., Admitted June 10, 1919.

LANDE, CLARENCE O., Admitted May 20, 1919.

LEVINSKYI, HENRY C., Admitted September 16, 1918.

LYNCH, JAS. W., Admitted June 10, 1919.

MADDOX, DAN W., Admitted May 2, 1919.

MCMAMARA, NELLIE, Admitted July 5, 1918.

MCCABE, B. R., Admitted July 1, 1918.

MCCRACKEN, F. E., Admitted February 24, 1919.

MCCUE, T. F., Admitted October 11, 1918.

MOFFETT, DONALD R., Admitted February 24, 1919.

NEIDIG, MILO H., Admitted May 3, 1919.

NELSON, HARRY H., Admitted March 1, 1919.

NYQUIST, JOHN S., Admitted March 15, 1919.

OLSON, CHAS. L., Admitted January 6, 1919.

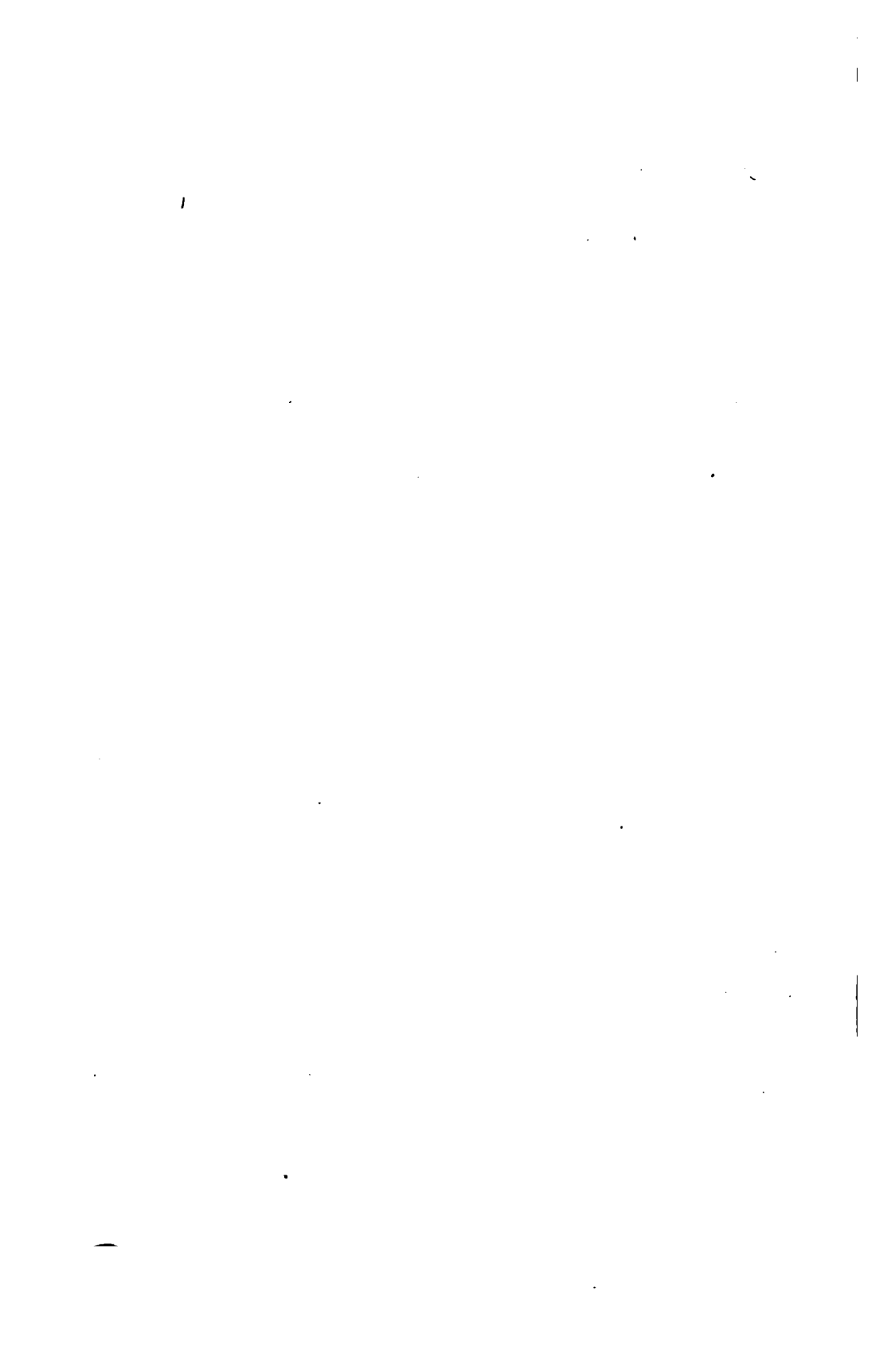
ROKKE, F. W., Admitted March 24, 1919.

ROUDEBUSH, REX S., Admitted January 23, 1919.

RYNERSON, WALTER S., Admitted July 1, 1919.

SLOAN, EMILY E., Admitted June 10, 1919.

STUDDERS, CHAS. F., Admitted June 10, 1919.





**DIRECTORY**  
**OF THE**  
**JUDICIAL DISTRICTS OF THE STATE OF MONTANA**  
**1919**

---

**FIRST JUDICIAL DISTRICT.**

County of Lewis and Clark. County Seat, Helena.  
District Judges: Hon. R. Lee Word; Hon. W. H. Poorman.  
Officers: County Attorney: Lester H. Loble, Esq.  
Clerk of District Court: F. L. Reece.  
Sheriff: Geo. W. Huffaker.

---

**SECOND JUDICIAL DISTRICT.**

County of Silver Bow. County Seat, Butte.  
District Judges: Hon. John V. Dwyer; Hon. J. J. Lynch; Hon.  
Edwin M. Lamb.  
Officers: County Attorney: Jos. R. Jackson, Esq.  
Clerk of District Court: Otis Lee.  
Sheriff: Jno. K. O'Rourke.

---

**THIRD JUDICIAL DISTRICT.**

Counties of Deer Lodge, Powell and Granite.  
District Judge: Hon. George B. Winston.  
Officers of Deer Lodge County (County Seat, Anaconda):  
County Attorney: David H. Morgan.  
Clerk of District Court: James White.  
Sheriff: L. L. Hartsell.

**Officers of Powell County (County Seat, Deer Lodge):**

County Attorney: W. E. Keeley, Esq.

Clerk of District Court: Robert Midtlyng.

Sheriff: Thos. Mullen.

**Officers of Granite County (County Seat, Philipsburg):**

County Attorney: D. M. Durfee, Esq.

Clerk of District Court: Wm. B. Calhoun.

Sheriff: Fred. C. Burks.

---

**FOURTH JUDICIAL DISTRICT.**

Counties of Mineral, Missoula, Ravalli and Sanders.

District Judges: Hon. A. L. Duncan; Hon. R. Lee McCulloch;

Hon. Theodore Lentz.

**Officers of Mineral County (County Seat, Superior):**

County Attorney: Ivan E. Merrick, Esq.

Clerk of District Court: Blanche M. Hyde.

Sheriff: Wm. La Comb.

**Officers of Missoula County (County Seat, Missoula):**

County Attorney: Dwight N. Mason, Esq.

Clerk of District Court: Harry M. Rawn.

Sheriff: J. T. Green.

**Officers of Ravalli County (County Seat, Hamilton):**

County Attorney: Leonard Goodwin, Esq.

Clerk of District Court: J. T. Coughenour.

Sheriff: C. E. Hogue.

**Officers of Sanders County (County Seat, Thompson Falls):**

County Attorney: Adelbert A. Alvord, Esq.

Clerk of District Court: Wm. Strom.

Sheriff: Joseph L. Hartman.

**FIFTH JUDICIAL DISTRICT.**

**Counties of Beaverhead, Jefferson and Madison.**

**District Judges:** Hon. Joseph C. Smith; Hon. W. A. Clark.

**Officers of Beaverhead County (County Seat, Dillon):**

County Attorney: Wilber G. Gilbert, Esq.

Clerk of District Court: Fred Rife.

Sheriff: C. K. Wyman.

**Officers of Jefferson County (County Seat, Boulder):**

County Attorney: J. E. Kelly, Esq.

Clerk of District Court: W. B. Hundley.

Sheriff: T. L. Locker.

**Officers of Madison County (County Seat, Virginia City):**

County Attorney: Lyman H. Bennett, Esq.

Clerk of District Court: Matt Carey.

Sheriff: Clarence W. Hungerford.

---

**SIXTH JUDICIAL DISTRICT.**

**Counties of Park, Stillwater and Sweet Grass.**

**District Judge:** Hon. Albert P. Stark.

**Officers of Park County (County Seat, Livingston):**

County Attorney: E. M. Niles, Esq.

Clerk of District Court: W. H. Pethybridge.

Sheriff: James McClarty.

**Officers of Stillwater County (County Seat, Columbus):**

County Attorney: M. L. Parcels, Esq.

Clerk of District Court: G. B. Iverson.

Sheriff: Edward B. Fellows.

**Officers of Sweet Grass County (County Seat, Big Timber):**

County Attorney: F. M. Lamp, Esq.

Clerk of District Court: H. C. Pound.

Sheriff: G. B. Long.

**JUDICIAL DISTRICTS OF THE****SEVENTH JUDICIAL DISTRICT.**

**\*Counties of Dawson, Richland, Wibaux and McCone.**

**District Judge: Hon. C. C. Hurley.**

**Officers of Dawson County (County Seat, Glendive):**

**County Attorney: Albert Anderson, Esq.**

**Clerk of District Court: Frank A. Parrett.**

**Sheriff: A. H. Helland.**

**Officers of Richland County (County Seat, Sidney):**

**County Attorney: Chas. E. Collett, Esq.**

**Clerk of District Court: Guy L. Rood.**

**Sheriff: Fred. D. Sullivan.**

**Officers of Wibaux County (County Seat, Wibaux):**

**County Attorney: Edward F. Fisher, Esq.**

**Clerk of District Court: A. E. Jeffers.**

**Sheriff: A. Barclay.**

**Officers of McCone County (County Seat, Circle):**

**County Attorney: O. J. Thompson, Esq.**

**Clerk of District Court: F. S. Kalberg.**

**Sheriff: H. W. Johnson.**

---

**EIGHTH JUDICIAL DISTRICT.**

**County of Cascade:**

**District Judges: Hon. Jere B. Leslie; Hon. Harry H. Ewing.**

**Officers of Cascade County (County Seat, Great Falls):**

**County Attorney: Howard G. Bennett, Esq.**

**Clerk of District Court: Geo. Harper.**

**Sheriff: J. P. Burns.**

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**\*County of McCone created by Laws 1919, Chap. 33, p. 68.**

STATE OF MONTANA.

xi

NINTH JUDICIAL DISTRICT.

County of Gallatin. County Seat, Bozeman.

District Judge: Hon. Ben. B. Law.

Officers: County Attorney: C. E. Carlson, Esq.

Clerk of District Court: W. L. Hays.

Sheriff: Chas. C. Esgar.

---

TENTH JUDICIAL DISTRICT.

County of Fergus. County Seat, Lewistown.

District Judges: Hon. Roy E. Ayers, \*Hon. Jack Briscoe.

Officers: County Attorney: Stewart McConochie, Esq.

Clerk of District Court: James L. Martin.

Sheriff: John H. Stephens.

---

ELEVENTH JUDICIAL DISTRICT.

Counties of Flathead and Lincoln.

District Judge: Hon. T. A. Thompson.

Officers of Flathead County (County Seat, Kalispell):

County Attorney: T. H. MacDonald, Esq.

Clerk of District Court: R. N. Eaton.

Sheriff: W. R. Martin.

Officers of Lincoln County (County Seat, Libby):

County Attorney: W. H. Gray, Esq.

Clerk of District Court: Timothy Miller.

Sheriff: F. R. Baney.

---

\*Elected November 5, and appointed November 9, 1918, to succeed Hon. H. L. DeKalb, resigned May 18, 1918.

## TWELFTH JUDICIAL DISTRICT.

County of Chouteau.

District Judge: Hon. John W. Tattan.

Officers of Chouteau County (County Seat, Fort Benton):

County Attorney: H. L. Miller, Esq.

Clerk of District Court: Geo. D. Patterson.

Sheriff: Merritt Hanagan.

---

## THIRTEENTH JUDICIAL DISTRICT.

Counties of Carbon, Big Horn and Yellowstone.

District Judges: Hon. Chas. A. Taylor; Hon. A. C. Spencer.

Officers of Carbon County (County Seat, Red Lodge):

County Attorney: H. A. Simmons, Esq.

Clerk of District Court: G. L. Finley.

Sheriff: George Headington.

Officers of Big Horn County (County Seat, Hardin):

County Attorney: Franklin D. Tanner, Esq.

Clerk of District Court: Frank A. Nolan.

Sheriff: John MacLeod.

Officers of Yellowstone County (County Seat, Billings):

County Attorney: E. E. Collins, Esq.

Clerk of District Court: Fred Inabnit.

Sheriff: S. W. Matlock.

---

## FOURTEENTH JUDICIAL DISTRICT.

Counties of Meagher, Broadwater and Wheatland.

District Judge: Hon. John A. Matthews.

Officers of Meagher County (County Seat, White Sulphur Springs):

County Attorney: Earle F. Angell, Esq.

Clerk of District Court: Geo. H. Bell.

Sheriff: Geo. B. Nagues.

**Officers of Broadwater County (County Seat, Townsend):**

County Attorney: Fred. W. Schmitz, Esq.

Clerk of District Court: Fred Bubser.

Sheriff: John J. McDonald.

**Officers of Wheatland County (County Seat, Harlowton):**

County Attorney: Robt. N. Jones, Esq.

Clerk of District Court: A. T. Anderson.

Sheriff: L. W. Clark.

---

**FIFTEENTH JUDICIAL DISTRICT.**

**\*Counties of Rosebud, Musselshell and Treasure.**

District Judge: Hon. Geo. P. Jones.

**Officers of Rosebud County (County Seat, Forsyth):**

County Attorney: Donald Campbell, Esq.

Clerk of District Court: D. J. Muri.

Sheriff: Henry N. Grierson.

**Officers of Musselshell County (County Seat, Roundup):**

County Attorney: V. D. Dusenbery, Esq.

Clerk of District Court: W. G. Jarrett.

Sheriff: Chas. C. Hopkins.

**Officers of Treasure County (County Seat, Hysham):**

County Attorney: E. D. Gerye, Esq.

Clerk of District Court: J. D. Clark.

Sheriff: John Taylen.

---

**SIXTEENTH JUDICIAL DISTRICT.**

**†Counties of Custer, Fallon, Prairie, Carter, Powder River and Garfield.**

District Judges: Hon. Daniel L. O'Hern; \*Hon. Charles J. Dousman.

**Officers of Custer County (County Seat, Miles City):**

County Attorney: Frank Hunter, Esq.

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\*County of Treasure created by Laws 1919, Chap. 5, p. 8.

†County of Powder River created by Laws 1919, Chap. 141, p. 277.

County of Garfield created by Laws 1919, Chap. 4, p. 3.

\*Appointed March 10, 1919, pursuant to provisions of Chapter 144, Laws of 1919, p. 285.

Clerk of District Court: C. A. Lindeberg.

Sheriff: Austin B. Middleton.

Officers of Fallon County (County Seat, Baker):

County Attorney: P. C. Cornish, Esq.

Clerk of District Court: Ralph Keener.

Sheriff: F. F. Kelling.

Officers of Prairie County (County Seat, Terry):

County Attorney: Joseph C. Tope, Esq.

Clerk of District Court: W. A. Cameron.

Sheriff: E. H. Brooks.

Officers of Carter County (County Seat, Ekalaka):

County Attorney: Rudolph Nelstead, Esq.

Clerk of District Court: L. J. O'Grady.

Sheriff: Geo. S. Boggs.

Officers of Garfield County (County Seat, Jordan):

County Attorney: John J. Cavan, Esq.

Clerk of District Court: J. P. McDonald.

Sheriff: Matt J. Roke.

Officers of Powder River County (County Seat, Broadus):

County Attorney: N. A. Burke, Esq.

Clerk of District Court: H. R. Straiton.

Sheriff: W. E. Sutter.

---

#### SEVENTEENTH JUDICIAL DISTRICT.

Counties of Phillips and Valley.

District Judge: Hon. John Hurly.

Officers of Phillips County (County Seat, Malta):

County Attorney: F. C. Gabriel, Esq.

Clerk of District Court: C. M. Porter.

Sheriff: Thos. S. Johnson.

Officers of Valley County (County Seat, Glasgow):

County Attorney: Carl D. Borton, Esq.

Clerk of District Court: Oscar S. Cutting.

Sheriff: C. W. Powell.



**EIGHTEENTH JUDICIAL DISTRICT.**

**Counties of Blaine and Hill.**

**District Judge:** Hon. W. B. Rhoades.

**Officers of Blaine County (County Seat, Chinook):**

County Attorney: D. L. Blackstone, Esq.

Clerk of District Court: A. W. Ziebarth.

Sheriff: J. Q. Laswell.

**Officers of Hill County (County Seat, Havre):**

County Attorney: C. R. Stranahan, Esq.

Clerk of District Court: Geo. W. Glass.

Sheriff: Matthew McLain.

---

**\*NINETEENTH JUDICIAL DISTRICT.**

**Counties of Glacier, Pondera, Teton and Toole.**

**†District Judge:** Hon. John J. Greene.

**Officers of Glacier County (County Seat, Cut Bank):**

County Attorney: Wiley Shannon, Esq.

Clerk of District Court: Iden Rasmussen.

Sheriff: P. A. Davis.

**Officers of Pondera County (County Seat, Conrad):**

County Attorney: Wm. L. Bullock.

Clerk of District Court: C. H. Shepherd.

Sheriff: J. L. Billings.

**Officers of Teton County (County Seat, Chouteau):**

County Attorney: George W. Magee, Esq.

Clerk of District Court: Paul Jacobson.

Sheriff: I. S. Martine.

**Officers of Toole County (County Seat, Shelby):**

County Attorney: Jesse G. Henderson, Esq.

Clerk of District Court: Perry J. Day.

Sheriff: J. S. Alsup.

---

\*Nineteenth Judicial District created by Laws 1919, Chap. 166, p. 318.

†Appointed March 8, 1919, pursuant to provisions of Chapter 166, Laws of 1919.

**\*TWENTIETH JUDICIAL DISTRICT.**

Counties of Roosevelt and Sheridan.

†District Judge: Hon. C. E. Comer.

Officers of Roosevelt County (County Seat, Mondak):

County Attorney: Ernest L. Walton, Esq.

Clerk of District Court: T. Forbes.

Sheriff: P. J. Nacey.

Officers of Sheridan County (County Seat, Plentywood):

County Attorney: J. J. Gunther, Esq.

Clerk of District Court: O. R. Girard.

Sheriff: Jack Bennett.

---

\*Created by Laws 1919, Chap. 168, p. 323.

†Appointed March 8, 1919, pursuant to provisions of Chapter 168, Laws of 1919.

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## **SUPREME COURT RULES.**

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**For the Rules of the Supreme Court of the State of Montana,  
see 53 Mont. xxvii.**

**Amendment, see 54 Mont. xxxi.**

**(~~xxx~~)**



CASES DETERMINED  
IN THE  
SUPREME COURT

AT THE  
MARCH TERM, 1918.

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THE HON. THEODORE BRANTLY, Chief Justice.

THE HON. SYDNEY SANNER,  
THE HON. WILLIAM L. HOLLOWAY, } Associate Justices.

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STATE, RESPONDENT, v. INICH, APPELLANT.

(No. 4,122.)

(Submitted April 30, 1918. Decided May 20, 1918.)

[173 Pac. 230.]

*Criminal Law—Murder—Self-defense—Interpreters—Evidence*  
*—Cross-examination—Harmless Error—Instructions—Appeal*  
*—Matters Reviewable—Waiver.*

**Murder—Self-defense—Evidence—Admissibility.**

1. Evidence of hostile encounters between defendant and the deceased on the evening of and previous to the killing for which defendant was being tried was admissible to ascertain the state of mind of the parties at the time and thus to determine who was the aggressor.

[As to condition of mind of the slayer that reduces the crime of murder to manslaughter, see note in 134 Am. St. Rep. 726.]

**Same—Conflicting Evidence—Judgment—Review.**

2. The verdict of the jury in a capital case based on conflicting testimony and approved by an order overruling a motion for a new trial will not be disturbed on appeal.

**Same—Trial—Exceptions—Review.**

3. Rulings of the court made during the trial of a criminal cause to which no exceptions were reserved are not reviewable on appeal.

**Same—Appeal—Exceptions—Briefs—Assignments of Error—Waiver.**

4. Assignment of error based upon alleged objectionable remarks made during trial by the county attorney but not excepted to nor argued in appellant's brief will be deemed waived.

**Same—Trial—Interpreters—Discretion.**

5. Determination of the question whether an interpreter is necessary for a particular witness lies within the discretion of the trial court, and its conclusion is not subject to review except for a manifest and gross abuse of discretion.

**Same—Interpreters—Appointment—When not Error.**

6. Abuse of discretion in appointing an interpreter in a criminal case will not justify setting aside a conviction, unless defendant apparently was prejudiced thereby.

**Same.**

7. Where a foreign-born witness understood and spoke with reasonable ease the English language of the street and that used in ordinary business but encountered difficulty and embarrassment when subjected to examination on the witness-stand, the appointment of an interpreter *held* not to have been a manifest or gross abuse of discretion.

**Same—Trial—Cross-examination—Rule.**

8. Cross-examination must be limited to matters about which the witness has testified in his examination in chief.

**Same—Trial—Evidence—Remarks of Judge.**

8a. A trial judge may state his reasons for his rulings in admitting and excluding evidence, so long as he refrains from expressing an opinion as to its weight, leaving this to the judgment of the jury.

**Same—Trial—Remarks by Judge—Harmless Error.**

9. Where the trial court in its instructions admonished the jury to disregard any comments or remarks made by it in admitting or excluding evidence, alleged error in this regard was rendered harmless.

**Same—State's Witnesses—Refusal to Call.**

10. Refusal of the court to require the state to call and examine an eye-witness to the crime whose name was indorsed on the information was proper.

**Same—Defendant as Witness—Cross-examination.**

11. Defendant having chosen to become a witness in his own behalf, became subject to cross-examination as to admissions made by him, to the same extent as any other witness.

**Same—Cross-examination of Defendant—Harmless Error.**

12. Requiring defendant to answer on his cross-examination as to immaterial matters was harmless where they had been gone into fully in the examination of other witnesses.

**Same—Witnesses—Repetition of Questions—Harmless Error.**

13. Where a witness had enumerated all the persons present at a shooting, requiring an answer to an inquiry whether he was positive that no one else was there resulted in useless repetition but not in prejudicial error.

**Same—Instruction as to Guilt or Innocence of Defendant.**

14. An instruction that "the whole of your number must agree in finding the defendant guilty or not guilty," *held* not objectionable as denying the jury the liberty of reaching a disagreement.

**Same—Insufficient Instruction—Duty of Appellant.**

15. Failure of defendant to offer an instruction more specific than one complained of as erroneous bars him from alleging error in the giving of the latter.

Same—Self-defense—Requested Instructions—Refusal—When not Error.  
16. Where the court had instructed the jury fully on the matter of self-defense, it was not reversible error to refuse requested instructions thereon although the court might properly have given them.

*Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.*

MARCO INICH was convicted of murder in the first degree, and appeals from the judgment and order denying new trial. Affirmed.

*Mr. Lowndes Maury and Mr. A. G. Shone, for Appellant, submitted a brief; Mr. Maury argued the cause orally.*

*Mr. S. C. Ford, Attorney General, Mr. Frank Woody, Assistant Attorney General, Mr. Jos. R. Jackson, County Attorney, and Mr. Frank L. Riley and Mr. N. A. Rotering, Assistant County Attorneys of Silver Bow County, for the State, submitted a brief; Mr. Jackson argued the cause orally.*

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, Marco Inich, was convicted of the crime of murder in the first degree and sentenced to imprisonment for life. He has appealed from the judgment and an order denying him a new trial. The principal contention made in his behalf is that the court erred in denying him a new trial because the evidence, from any point of view, did not justify a finding of any higher grade of homicide than manslaughter. If this contention were maintainable, a new trial should have been ordered, for however clearly the evidence established the guilt of the defendant of an unlawful homicide, the jury could not lawfully find him guilty of murder unless every element necessary to constitute this grade of the crime was shown to be present. That this contention cannot be maintained, however, a brief synopsis of the incidents leading up to the homicide and the circumstances attending it, gathered from the testimony of the several witnesses, will demonstrate. The defendant and most of

the witnesses are Servians or Austro-Servians. Several of them gave their testimony through an interpreter. None of them spoke English well. On this account it is difficult to gather from their statements a clear narrative.

On the evening of April 15, 1917, the people of the Servian nationality residing in Butte presented an amateur theatrical performance at the Auditorium on West Broadway in that city, followed by a dance. The defendant had gone to the Auditorium with his wife, who took part in the performance as one of the characters. During its progress he remained on the steps leading into the building or in the entry-way near the box office. After it had proceeded for some time, he started to leave the building to go across the street to a saloon. He was wearing a ring which he had purchased two or three months before from one Novitza Inich, a cousin of his, paying him \$20 for it. Eli Kavacevich, a cousin of the deceased, claimed that he had purchased the ring from a traveling jewelry salesman in Alaska, and had brought it with him on coming to Butte, some seven or eight months before, and hence that it belonged to him. The evidence is not clear as to how Novitza Inich came by the ring. We gather from the testimony of Frank Babich, who appears to have been a friend of Eli Kavacevich, that he himself had borrowed the ring from Kavacevich to keep for two or three days, and had in turn lent it to Inich. As the defendant was leaving the building he was approached first by Babich, and then Kavacevich, who demanded a return of the ring to Kavacevich. The demand was refused, unless he was paid what he had paid Inich for it. The controversy over it threatened to develop into a fight, but this was prevented by Jerry Popovich, who accompanied the defendant, or was standing near. Later while on his way again to the saloon, defendant was again accosted by Kavacevich and Babich, who attempted to take the ring by force. The result was a fight between Kavacevich and defendant, during the course of which defendant struck Kavacevich in the face with his fist, giving him a black eye. Some of the witnesses stated that Kavacevich in seeking to take the ring bit

one of defendant's fingers. The fight was stopped by Jerry Popovich and Mike Vitcovich, who accompanied the defendant. While these occurrences were taking place, the deceased was sitting in the audience in the Auditorium observing the performance. Someone informed him of what was going on. He thereupon left the audience, came out and joined his cousin. There is evidence tending to show that he came out about the time the fight started, and took part in it until it was stopped by Popovich and Viteovich. In company with his cousin, Babich, and others he followed over to the saloon where the defendant was, and, upbraiding him for engaging in a fight with Eli Kavacevich because the latter was a boy (he was less than twenty years old), called on him to come out and fight it out with him. The defendant refused because, as he said, there were too many for him to fight. Later he left the saloon, going first south to Park Street, and then east toward Main Street. He was overtaken on Park Street in front of the American Theater by the two Kavaceviches, Babich and Obran Ronevich. John, Paul and Marco Melichovich also accompanied them, or came up behind them. The deceased, aided by Babich and Ronevich, thereupon engaged the defendant in a fight, which continued until it was stopped by Con Shea, a policeman. The policeman made no arrest, but took the defendant from the scene of the fight to the corner of Park and Main Streets, where he left him, telling him to go home and stay there. This he promised to do. The deceased, his cousin Eli, Frank Babich and the Melichoviches went east on Park Street to No. 82, where a saloon and restaurant were kept by Louis Popovich. Obran Babich, Obran Ronevich and Mike Kujack either went with them, or followed soon after. They remained there from 20 minutes to a half hour. While they were there the defendant went to his home somewhere in the eastern part of the city, procured a revolver, and returned. On his way he stopped at a saloon at 250 East Park Street kept by one Achim Lujonja. He there met the witness Tudor Aleksich. He called for a glass of beer. After he drank a part of it he pulled off his

necktie and put it in his pocket, remarking as he did so, "I am afraid someone will choke me to-night." After doing this he said, "Now I am sure." Having finished the beer, he pulled the revolver from his pocket, and said, "This will be judgment for someone to-night." Asked by the witness, "Whom did you have trouble with?" or "Whom are you fighting with?" he said, "I know." As he was leaving the place he said, "We did not have no meat for Easter; we will have some to-night." From there he proceeded to Popovich's saloon. He found there the Kavaceviches, the Melichoviches and Babich, besides Popovich and his bartender Alex Raich. The latter were behind the bar serving drinks. The others were standing along the bar in front. The defendant first passed through the barroom to the restaurant in the rear. In a moment he returned to the barroom and stopped about midway toward the front door directly behind the deceased, who was standing facing the bar. Up to this time no one had spoken to the defendant, nor had he spoken. As he stopped he turned facing toward the deceased and spoke in the Servian language using an expression the equivalent of which in English, according to some of the witnesses, was, "Come on and fight"; according to others, "Come on out; come on and square up now," or "Let us go and square up," or "Let us go and square it up," or "Come on and square up with me." It was admitted by all the witnesses that the expression used by defendant, however it is rendered in English, has a friendly as well as an unfriendly import, depending upon the circumstances under which it is used. According to some of the witnesses, the deceased made no reply, but merely turned and looked at the defendant, remaining near the bar. Others stated that he said, "I don't want to fight now; we fight some other time." Others testified that he laid his overcoat on the bar and, turning, advanced a step toward the defendant. The defendant then stepped back toward the wall, drew his revolver from the right-hand pocket of his pantaloons, and fired three shots at the deceased, the second taking effect in his left breast, and resulting in his death a few min-



utes afterward. Neither the deceased nor anyone else of those present touched the defendant until he was in the act of firing the third shot, when he was caught and held by Popovich and Raich, who sprang from behind the bar and caught and held him until he was arrested by Policeman Shea, who hastened to the place when he heard the shooting. The foregoing account is the substance of what was testified to by the state's witnesses.

The defendant sought to justify the killing on the ground of self-defense. Sworn as a witness in his own behalf, after giving a detailed account of the occurrences at the Auditorium and the American Theater, he testified that when he left Policeman Shea he went to his home, procured his revolver to protect himself against the deceased and his companions while he returned to the Auditorium to accompany his wife home; that he went into Lujonja's place looking for his two friends, Novitza Inich and Novitza Melichovich, to accompany him; that he entered Popovich's place for the same purpose; that when he entered he passed through the barroom between the bar and the wall toward which it fronted, to the restaurant in the rear and returned; that when he returned, the deceased was standing at the bar, Eli Kavacevich in the middle of the floor between the bar and the wall, and Babich over near the wall, so that he could not get out without meeting them; that he said to the deceased, "Come on, let's divide it up," meaning that he was ready to settle the dispute over the ring by accepting half of what it had cost him and surrendering it to Eli Kavacevich; that no one of them said anything to him; that while he was still speaking, the deceased glanced at the other two, whereupon the three sprang toward him; that he then pulled the revolver from his pocket and fired twice at the floor; that the deceased seized him by the throat with his right hand and, with his left upon his breast, pushed him back against the wall, choking him so that he could not breathe; that Babich was all the while striking him; that he then fired the third shot, inflicting the wound from which the deceased died. He denied that he exhibited his revolver to Aleksich at Lujonja's place, or made any statement

to him, though he admitted that he pulled off his necktie and put it in his pocket, saying as he did so, "Now I am sure now, so that they won't choke me." The witness Kujak gave substantially the same account of the affray as did the defendant, except that he stated that he did not see Babich, and that deceased uttered some words as he sprang toward the defendant, the purport of which he did not understand. There was other testimony which in some particulars also corroborated defendant's story. The state introduced evidence in rebuttal to the effect that search was made at Popovich's place for bullet holes, which resulted in locating one in the back bar about nine and one-half feet from the floor, and another in the ceiling on a line from where the defendant stood toward the back bar, but none were found in the linoleum which covered the floor. The bullet which killed the deceased was recovered from his body.

There is much conflict in the statements of the different witnesses as to the number and names of the persons who engaged in the affrays at the Auditorium and the American Theater, particularly with reference to the latter. There is evidence which justified the inference that the deceased and his companions followed the defendant from the Auditorium for the purpose of punishing him for striking Eli Kavacevich, and incidentally compelling a surrender of the ring. The statements of some of the witnesses bear out the theory that the deceased and his companions were not in pursuit of Inich, but, having for the time abandoned the controversy, casually overtook him while peaceably on their way to their homes.

It is not necessary to determine the number of participants [1] in either of the altercations, nor how the meeting at the American Theater came about. It is sufficient to say in this connection that the deceased and his companions were in the wrong in both instances. Assuming that Eli Kavacevich was the owner of the ring, he had no right to take it from the defendant by force; nor was the deceased justified in renewing the fight at the American Theater, whether the meeting there was casual or intentional, either to punish the defendant for

the black eye which his cousin had received from him at the Auditorium, or to compel him to give up the ring. The merits of these affrays are not now a proper subject of inquiry. The evidence with reference to them was properly admitted, however, to aid the jury to ascertain the state of mind of the defendant and the deceased at the time of the fatal conflict at Popovich's place, and thus to determine who was the aggressor. (*State v. Shafer*, 26 Mont. 11, 66 Pac. 463; *State v. Hanlon*, 38 Mont. 557, 100 Pac. 1035; *State v. Whitworth*, 47 Mont. 424, 133 Pac. 364.)

The jury were required to determine from the circumstances [2] immediately surrounding the killing, in the light of these occurrences, whether the defendant, as a reasonable man, deemed himself to be in imminent danger of death or great bodily harm and acted in necessary self-defense; or whether he acted under an irresistible impulse of a heat of passion engendered by them, which had not yet cooled, or had been aroused by sudden assault upon him at Popovich's place after he had approached the deceased and his companions for an amicable settlement of their dispute; or whether he was prompted by preconceived malice or ill will, but without premeditated design; or, finally, whether he acted from a deliberate, premeditated design to gratify his feelings of malice and revenge. It was their duty to weigh the testimony of the several witnesses, and to reconcile their inconsistent and contradictory stories. If they could not do this, they were at liberty to give credit to those of them whom they deemed more worthy of credit, and base their verdict upon their testimony. The testimony of the state's witnesses fully warranted the inference that the defendant deliberately brought on a renewal of the conflict for the purpose of securing an excuse to kill the deceased. Evidently the jury so decided; hence their conclusion that the defendant was guilty of the highest degree of the crime charged. This verdict implies conclusively that they rejected entirely the testimony of the defendant and his witnesses. This was entirely within their province. By overruling the motion for a new trial, the district court

approved the verdict. Under the familiar rule so often announced by this court, it is beyond our power to set it aside or revise it.

To several rulings of the court, made the basis of assignments of error, counsel failed to reserve exceptions. This is true of assignments 1, 2, 3, 5, 9, 14 and 15. The questions sought to be presented by them are not before this court for examination. (*State v. Lewis*, 52 Mont. 495, 159 Pac. 415.)

After the examination of the witness Eli Kavacevich had proceeded somewhat, upon his complaint that he could not understand counsel, the court called an interpreter to assist him. [4] No exception was reserved by counsel. When the cross-examination began, counsel asked the witness, "What is your object in not wishing to speak in English?" The county attorney remarked, "The interpreter has been sworn, and there is no use in trying to quarrel with the witness." The court thereupon ordered the examination to proceed with the interpreter, counsel excepting to the order. The remark of the county attorney and the order are made the basis of the fourth assignment. No exception was taken to the language of the county attorney, nor is anything said on the subject in the part of the brief devoted to argument. The assignment is deemed to have been waived in this regard. (*State v. Lewis, supra; Trogdon v. Hanson Sheep Co.*, 49 Mont. 1, 139 Pac. 792.)

The statute (sec. 7894, Rev. Codes) provides, "When a witness does not understand and speak the English language, an interpreter must be sworn to interpret for him." Whether [5] an interpreter is necessary for a particular witness must be determined by the trial court, and its conclusion is not subject to review by this court except for a manifest and gross abuse of discretion. (*People v. Salas*, 2 Cal. App. 539, 84 Pac. 295; *People v. Ramirez*, 56 Cal. 535, 38 Am. Rep. 73.) Even [6] so, error in this particular will not justify setting aside a conviction fully sustained by the evidence, when the defendant has apparently suffered no prejudice by reason of it. Of course, as counsel say, an interpreter should not be called if

the witness can understand and answer the questions put to [7] him. But it is often the case that a person who understands and speaks with reasonable ease the language of the street or of ordinary business encounters difficulty and embarrassment when subjected to examination as a witness during proceedings in court. As we read the record, such seems to have been the case with the witness here. We therefore do not think the court manifestly in error in calling the interpreter.

John Melichovich, a witness for the state, on direct examination was questioned as to what occurred at Popovich's place at the time of the killing. He was not examined as to any of the [8] incidents which occurred before that time. On cross-examination, over objection of the county attorney that it was not within the range of proper cross-examination, inquiry was made of him as to what he observed of the affrays at the Auditorium and the American Theater. He was then asked, "What were you doing at the American Theater?" He answered, "I was standing there." Before he went further the county attorney renewed his objection, and it was sustained. This is made the basis of the sixth assignment. The ruling was correct. The examination should have been limited to what he had been questioned about in his examination in chief.

The rulings upon which are predicated the seventh and eighth assignments were made in excluding items of evidence which were wholly immaterial. The rulings were correct.

During the direct examination of the witness Mike Vitcovich, recalled by defendant, he was asked, "How many were on opposite sides of the affray at the American Theater?" Upon objection by the county attorney, the judge remarked, "I don't really see what the conditions in this fight at the American Theater had to do with the final trouble, excepting to show the state of mind of the different parties; the objection will be overruled, however." Counsel, reserving an exception to this remark, made it the subject of their ninth assignment of error. The argument is that it was clearly an adverse comment upon all the defendant's evidence disclosing what took place at the Auditorium and the American Theater. There is no merit in

the contention. In our opinion, the remark was in no sense a comment upon the weight of the evidence, nor an undue restriction of the purpose it might legitimately serve in ascertaining the guilt or innocence of the defendant. The expression "state of mind," used by the court, includes in its general scope a temporary condition of feeling, as well as a continuing condition, connoting a trait of character or disposition; for in its broad sense, the term "state" is defined as "the circumstances or condition of a being or thing at a given time." (Inter. Dict.) As has already been noted, the purpose to be served by the testimony was not to disclose to the jury facts justifying the act of the defendant in shooting the deceased, but to throw light upon all the acts, motions and words of the parties immediately preceding and at the moment of the shooting to enable the jury to ascertain who had assumed the attitude of aggressor, and hence who was legally in the wrong. (*State v. Hanlon, supra.*) The purpose for which the jury might make use of the evidence was defined with sufficient exactness in this general [8a] expression made use of by the court. It is entirely proper for a trial judge to state his reasons for his rulings made in admitting and excluding evidence, the limitation laid upon him in this regard being that he refrain from expressing an opinion as to the weight a particular item is entitled to, but leave this entirely to the judgment of the jury. (12 Cyc. 540, notes.) But [9] for the sake of argument, let it be conceded that the language was somewhat inaccurate, and might otherwise have misled the jury. In paragraph 16 of the instructions the court very carefully told them that no remark made by it during any colloquy with counsel or in a ruling on objections during the course of the trial was intended by it to indicate an opinion on any question of fact or the credibility of any of the witnesses. It further told them to disregard wholly and dismiss from their minds any such remarks or comments by it or by counsel, and not to permit them to enter into their consideration of the case. In our opinion, this left the defendant no ground for complaint. The jury, as men of reasonable intelligence—which we may

presume they were—must have understood that all of the evidence was before them generally for consideration by them for any purpose for which they might deem it of value.

After the evidence on the part of the state had closed and [10] counsel for the defendant had examined five witnesses, they demanded that the county attorney be required to call and examine Paul Melichovich, an eye-witness of the shooting whose name was indorsed on the information. It does not appear whether or not counsel discovered this fact then for the first time. The court refused the demand. This ruling is made the basis of defendant's assignment No. 10. There was no error. (Rev. Codes, sec. 9283; *State v. Rolla*, 21 Mont. 582, 55 Pac. 523; *State v. Tighe*, 27 Mont. 327, 71 Pac. 3.)

Assignment 11 presents the question whether or not the defendant [11] should have been required to answer, on cross-examination, questions relating to certain admissions made by him to the county attorney on the next day after the shooting. There was no error. The defendant having chosen to become a witness in his own behalf, he became subject to cross-examination to the same extent as any other witness. (*State v. Schnepel*, 23 Mont. 523, 59 Pac. 927.)

During his cross-examination the defendant was required to [12] answer as to the ownership of the ring in controversy. Counsel objected that the evidence was immaterial; and this is the subject of assignment 12. The objection should have been sustained. The ownership of the ring was not a question at issue, and though under the stress of examination the defendant admitted that he had told the county attorney that it belonged to Eli Kavacevich, this fact could not be taken as a justification of the assault upon the defendant by Kavacevich and the deceased, nor did it serve any other purpose than to tend to obscure the issue on trial. It is not apparent, however, that defendant suffered prejudice. The whole matter of the ownership of the ring had been gone into during the examination of other witnesses.

Assignment 13: The witness Raich, called by the state in [13] rebuttal, after enumerating the names of all the persons

present at the time of the shooting, was asked if he was positive that no one else was there. Over objection of counsel he was permitted to answer, which he did in the affirmative. The inquiry was a useless repetition of the prior examination, but there was no prejudice.

Under assignment 16, error is predicated upon the giving of instruction 14, which is in the language of section 9484, Revised Codes. The propriety of giving this instruction was fully considered by this court in *State v. Farnham*, 35 Mont. 375, 89 Pac. 728, and again in *State v. De Lea*, 36 Mont. 531, 93 Pac. 814. Further discussion of the subject is foreclosed by these cases.

The subject of assignment 17 is the giving of the following [14] instruction: "In this case, the whole of your number must agree in finding the defendant guilty or not guilty of the crime alleged in the information herein, or of any crime included therein." The contention is that under this instruction the jury were denied the liberty of reaching a disagreement. The purpose of giving it was to inform the jury that this being a felony case they could not return a verdict except by unanimous vote. The average juror is presumed to know that he may disagree with his fellow-jurors, and that he is not bound to find a verdict because any number of them entertain views opposed to his own. In giving the instruction the court presumed that the jury knew their province in this regard, and hence deemed it unnecessary to give them a specific instruction on the subject. There was no error. (*State v. Hurst*, 23 Mont. [15] 484, 59 Pac. 911.) If counsel desired a specific instruction, they should have formulated and tendered one. Having failed to do so, defendant may not complain. (*State v. Powell*, 54 Mont. 217, 169 Pac. 46.)

Assignment 18 is not argued in the brief; hence it is passed without notice.

Assignments 19 and 20 allege error in the refusal by the court [16] to submit instructions A5 and A6, requested by the defendant, as follows:



"A5. It is not necessary for Marco Inich to prove by the greater weight of the evidence that he acted in self-defense in killing Lazar Kavacevich before you should find him not guilty. Unless you are satisfied beyond all reasonable doubt and a moral certainty that Marco Inich did not act in justifiable self-defense in firing the fatal shot, then you cannot under the law find him guilty of any crime whatever, and under such circumstances you must acquit him.

"A6. The right of self-defense is derived from nature. To repel force by force is the common instinct of every creature that has the means of defense. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated in many cases; it is a moral duty. The law of this country has left to all men the exercise of this natural right of self-defense in all cases in which the law is either too slow or too feeble to stay the hand of violence, and it must be considered by jurors that a man repelling imminent danger cannot always be expected to use as much care as if he had time to act deliberately."

In instructions A2, A3 and A4, given at the request of the defendant, and instructions 26, 27, 28, 30 and 31, given at the request of the state, the court fully covered the law of self-defense. Instruction No. 4 expressly told the jury that they must acquit the defendant if they found from all the evidence that he shot and killed deceased under the belief that he was in danger of receiving great bodily injury at his hands, or at the hands of any of those with him, and in the exercise of reasonable judgment fired the shot in order to protect himself from the apparently impending danger. In instruction 30, after quoting section 9282 of the Revised Codes, defining the burden of proof to be sustained by a defendant charged with murder, the court added: "And in this connection no greater burden is placed upon the defendant than that from the whole evidence taken together, a reasonable doubt as to the guilt of the defendant should be engendered." This, taken in connection with the others referred to, and also instructions 1 and 2, wherein the court told the jury that defendant must be acquitted in

case they entertained a reasonable doubt as to his guilt, was entirely sufficient.

Instruction A6 is a quotation from paragraph 528 of Brickwood's Sackett on Instructions. It was said of it by the supreme court of Missouri, in *Norris v. Whyte*, 158 Mo. 20, 59 S. W. 1037, that it is a correct abstract proposition of law, and might be given in a case of assault and battery where the plea of self-defense is interposed. We may go further and say that the court might properly have given it in this case (see *State v. Merk*, 53 Mont. 454, 164 Pac. 655). But it does not follow that it committed reversible error by refusing to give it, merely because defendant requested it. The instructions referred to above, taken together, we think so fully and fairly explained to the jury the law on the subject that they could not possibly have overlooked the evidence tending to justify the killing on the ground of self-defense, or failed to give it all the weight to which it was entitled.

Upon the whole we think the defendant was properly convicted. The judgment and order are therefore affirmed.

*Affirmed.*

MR. JUSTICE SANNER concurs.

MR. JUSTICE HOLLOWAY: I concur in the result reluctantly. In the course of this trial the court, without justification, rebuked counsel for defendant in a manner calculated to disparage him in the eyes of the jury, and to that extent infringed the constitutional right of the accused to appear by counsel; but in an effort to correct the errors, the court instructed the jury to disregard the remarks from the bench. It is held generally that errors of this character may be cured, and we must indulge the presumption that the jury heeded the admonition, and that the errors, in this instance, were cured.

## STATE, RESPONDENT, v. VAN LANINGHAM, APPELLANT.

(No. 4,146.)

(Submitted April 29, 1918. Decided May 20, 1918.)

[173 Pac. 795.]

*Criminal Law—Murder—Motive—New Trial—Newly Discovered Evidence—Rule—Insufficiency of Affidavits.***Murder—Jury Questions—Motive—Youth of Defendant.**

1. In a prosecution for murder, defendant's youth, the fact that the evidence against him came from persons not above suspicion, and that no motive adequate to a cautious or well-balanced mind was established, were matters for the jury's consideration in the first instance, and for that of the trial judge on motion for new trial.

[As to necessity of proving motive in prosecutions for murder, see note in Ann. Cas. 1912C, 236.]

**Same—Motive—Proof Unnecessary.**

2. The state is not required to show an adequate motive before defendant may be convicted of murder.

**Same—New Trial—Newly Discovered Evidence—Rule.**

3. Motions for new trial of criminal cases because of newly discovered evidence are not favored; in passing on them the courts are bound by the rules that the new evidence must have come to the knowledge of the applicant after trial; that failure to discover it sooner was not due to want of diligence; that it is so material that it would probably produce a different result upon another trial; that it is not cumulative merely; that the application must be supported by the affidavit of the witness; that the evidence must not be such as will tend only to impeach the character or credibility of a witness, and that it will likely be available on another trial.

**Same—Newly Discovered Evidence—Proper Denial of New Trial.**

4. Where certain items of alleged newly discovered evidence were cumulative in character, and as to others no satisfactory showing of diligence to discover them before trial was made, the motion for new trial was properly denied.

**Same.**

5. A declaration, said to have been made after trial, by the former wife of decedent, that "they had got the wrong man," but denied by her in a counter-affidavit, was insufficient to warrant a new trial on the ground of newly discovered evidence, in view of the circumstances under which it was alleged to have been made.

**Same.**

6. Where the jury knew that one of the state's witnesses was in jail on a felony charge and had been made a cell mate of defendant in order to obtain information, matter urged as newly discovered evidence to the effect that the witness had agreed to plead guilty and

On proof of *corpus delicti* in homicide, see subdivisions of note in 68 L. E. A. 34, 46, 57.

On particular application of rule of criminal liability of children to murder, see note in 36 L. E. A. 200.

On cumulative evidence as grounds for new trial in criminal cases, see note in 46 L. E. A. (n. s.) 903.

was thereafter discharged without trial went to his credibility, which had been thoroughly canvassed before the jury, and was insufficient to command a retrial.

Same.

7. A new trial was properly refused where the alleged newly discovered evidence was of such unsubstantial character as to render a different verdict improbable.

Same—Experiments—Newly Discovered Evidence—Insufficiency.

8. Retrial on the ground of newly discovered evidence touching an experimental horseback ride from the scene of the murder to defendant's house, *held* properly denied where the conditions under which it was made were dissimilar from those prevailing when defendant was shown to have made it, and where the witness' affidavit amounted to an expression of opinion contrary to that given by him at the trial.

Same—What not Newly Discovered Evidence.

9. Statements of persons which were known to counsel for defendant before the close of a murder trial did not constitute newly discovered evidence.

*Appeal from District Court, Custer County; Daniel L. O'Hern, Judge.*

GEORGE VAN LANINGHAM, *alias* Jack Logan, was convicted of murder, and from the judgment and an order denying new trial he appeals. Affirmed.

*Mr. Sharpless Walker* and *Mr. W. C. Packer*, for Appellant, submitted a brief; *Mr. Walker* argued the cause orally.

In a homicide case where all of the circumstances relied upon to prove guilt are not consistent with each other, with the hypothesis of guilt, and inconsistent with any other rational conclusion; or where under the evidence any one of several others might have committed the crime; or where the testimony on the part of the prosecution is inherently improbable and contradicts prior statements of the same state's witnesses; or where the motive and opportunity are not clearly shown; or where the defendant is not directly connected with the crime by credible testimony; or where the facts generally are involved in mystery and uncertainty,—which said conditions exist in this case,—the evidence is insufficient to sustain conviction, and on motion a new trial should be granted. (*State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *People v. Kennedy*, 7 Cal. Unrep. 184, 75 Pac. 845; *State v. Pagano*, 7 Wash.

549, 35 Pac. 387; *Piel v. People*, 52 Colo. 1, 119 Pac. 687; *Lonergan v. State*, 111 Wis. 453, 87 N. W. 455; *Casey v. State*, 20 Neb. 138, 29 N. W. 264; *State v. Clouser*, 69 Iowa, 313, 28 N. W. 615; *People v. Hare*, 57 Mich. 505, 24 N. W. 843; *People v. Campagna*, 240 Ill. 378, 88 N. E. 797; *Schusler v. State*, 29 Ind. 395; *State v. Dipley*, 242 Mo. 461, 147 S. W. 111; *Hall v. Commonwealth*, 149 Ky. 42, 147 S. W. 764; *Satterwhite v. State*, 77 Tex. Cr. 130, 177 S. W. 959; *Perkins v. State* (Miss.), 23 South. 579; *Tilley v. Commonwealth*, 90 Va. 99, 17 S. E. 895; *State v. Cremeans*, 62 W. Va. 134, 57 S. E. 405.)

Where the evidence on which a motion for a new trial is based has been discovered since the trial; is such that it could not have been obtained by reasonable diligence before; is material to the issues involved, and goes to the merits; is not merely cumulative, impeaching or contradictory; is shown by the best evidence of which the case admits; and would probably produce a different result upon retrial,—all of which said conditions exist in this case,—a new trial should be granted. (*State v. Matkins*, 45 Mont. 58, 121 Pac. 881; *Cahill v. E. B. & A. L. Stone Co.*, 167 Cal. 126, 138 Pac. 712; *People v. Benham*, 30 Misc. Rep. 466, 63 N. Y. Supp. 923; *State v. Stowe*, 3 Wash. 206, 14 L. R. A. 611, 28 Pac. 337; *State v. King*, 27 Utah, 6, 73 Pac. 1045; *State v. Keleher*, 74 Kan. 631, 87 Pac. 738; *Cantrell v. State*, 12 Okl. Cr. 534, 159 Pac. 1092; *State v. De Marias*, 27 S. D. 303, Ann. Cas. 1913D, 154, 130 N. W. 782; *Bailey v. State*, 36 Neb. 808, 55 N. W. 241; *Myers v. State*, 111 Ark. 399, L. R. A. 1915C, 302, 163 S. W. 1177; *Cockrell v. State*, 71 Tex. Cr. 543, 48 L. R. A. (n. s.) 1001, 160 S. W. 343; *Williams v. State*, 99 Miss. 274, 54 South. 857; *Carr v. State*, 106 Ga. 737, 32 S. E. 844, 11 Am. Crim. Rep. 613; *Keenan v. People*, 104 Ill. 385, 4 Am. Crim. Rep. 434; *Dennis v. State*, 103 Ind. 142, 2 N. E. 349, 5 Am. Crim. Rep. 469; *State v. Naylor*, 5 Boyce (Del.), 99, 90 Atl. 880; *Anderson v. State*, 43 Conn. 514, 21 Am. Rep. 669; *Read v. Commonwealth* (Va.), 22 Gratt. 924; Hayne's New Trial and Appeal, sec. 88.)

*Mr. S. C. Ford*, Attorney General, *Mr. A. A. Grorud*, Assistant Attorney General, and *Mr. Frank Hunter*, County Attorney of Custer County, for the State, submitted a brief; *Mr. Hunter* argued the cause orally.

The evidence in a criminal case need not exclude the possibility of innocence. (*United States v. Green*, 220 Fed. 973.) Motive need not be proved in order to sustain a conviction of murder. (*People v. Owens*, 132 Cal. 469, 64 Pac. 770; *People v. Weston*, 169 Cal. 393, 146 Pac. 871; *Shepherd v. People*, 19 N. Y. 537, 544; *People v. Bennett*, 49 N. Y. 138; *People v. Minisci*, 12 N. Y. St. Rep. 719, 46 Hun, 682; *Thurman v. State*, 32 Neb. 224, 49 N. W. 338.)

Where the truth of the alleged newly discovered evidence is utterly inconsistent with want of knowledge thereof prior to the trial, its showing was held insufficient. (*People v. Cesena*, 90 Cal. 381, 27 Pac. 300.) Where a witness was produced at the trial, it was held to have been negligence in the party not to have examined him fully. (*Arnold v. Skaggs*, 35 Cal. 684; and see *People v. Miller*, 33 Cal. 99; *Smith v. Smith*, 119 Cal. 183, 48 Pac. 730, 51 Pac. 183.) Where the alleged newly discovered evidence was so closely related to what the witness had testified to at the trial that it might have been brought out on cross-examination, it is not available as ground for new trial. (*People v. Phelan*, 123 Cal. 551, 56 Pac. 424.)

In *Kenway v. Hoffman*, 51 Wash. 105, 98 Pac. 98, it was held that where affiants were witnesses at the trial and the new matter was entirely open for investigation then, diligence was wanting, and the evidence cannot be said to be newly discovered.

As a general rule, newly discovered evidence of contradictory statements made by a witness after the trial is not ground for a new trial. (*Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775; *Husted v. Mead*, 58 Conn. 55, 19 Atl. 233; *Lasseter v. Simpson*, 78 Ga. 61, 3 S. E. 243; *Tobin v. People*, 101 Ill. 121; *Commonwealth v. Randole*, Thach. C. C. (Mass.) 500; *Sims v. Sims*, 12 Hun (N. Y.), 231; *Dexter v. Handy*, 13 R. I. 474; *Johnson v. A. Leffler Co.*, 122 Ga. 670,

50 S. E. 488; *Chatfield v. Lathrop*, 6 Pick. (Mass.) 417; *Duryee v. Dennison*, 5 Johns. (N. Y.) 248.) If the affidavits offered in support of the application are inherently improbable or inconsistent, or are rebutted by counter-affidavits, a new trial will be refused. (29 Cyc. 905.).

Evidence of admissions made by the successful party after the trial or of subsequent declarations inconsistent with his testimony on the trial is not cause for setting aside the verdict. (29 Cyc. 907; *State v. Anderson*, 14 Mont. 541, 37 Pac. 1; *Blake v. Rhode Island Co.*, 32 R. I. 213, Ann. Cas. 1912D, 852, and note, 78 Atl. 834.)

MR. JUSTICE SANNER delivered the opinion of the court.

Paul Schultz, a drayman of Miles City, was last seen alive between 8 and 9 o'clock in the evening of November 29, 1916. On the next morning at about 7 o'clock he was found dead in his barn, the circumstances indicating murder. For this murder one George Van Laningham was apprehended, tried, convicted and sentenced to life imprisonment. From the judgment as well as from an order denying him a new trial he appeals, insisting upon a reversal because the evidence is insufficient and because of newly discovered evidence warranting a retrial of the case.

I. The *corpus delicti* is conceded, and properly so, we think. Schultz was killed by a series of blows upon the fore part of the head. His body was found just inside the door of the barn lying on its back. Under his head was a horse blanket which the night before had been hanging up in the corner of the barn. The horses were loose. The electric light bulb, which hung out of reach, and which was operated by a switch near the door, was broken, its glass scattered about the floor. The blows which killed Schultz could conceivably have been kicks from a horse, but the circumstances, positive and negative, are sufficient to sustain the view that they were of human origin and were delivered by someone lying in wait. To connect the appellant with the deed the evidence, in brief, was this: Schultz, though

married, was living alone on the lot where his barn is situate. His habits were notoriously regular, and among them was to turn on the water for his horses at approximately 9 o'clock. The customary sound made by this operation was heard by neighbors on the same pipe-line on the evening of November 29 at 9:05. Schultz was well known to the appellant, who went by the name of Jack Logan. The latter was in Schultz's employ, staying at the family homestead, a road ranch twelve miles from town, where Schultz's wife was living, and where she and the appellant maintained illicit relations. The appellant had twice made remarks of a threatening character about Schultz. One of these was in connection with the trading off by Schultz of a gray horse called "Comet," the appellant saying that if this was done he would "fix the little Dutch son-of-a-bitch." The other was in connection with a break-down of a Ford machine belonging to Schultz, the appellant remarking in answer to Mrs. Schultz's expressed fears of Paul's wrath: "You needn't mind being scared of Paul; the next time you see him you won't be scared of him." On November 29, about 9:30 in the morning, the appellant and Mrs. Schultz started on a search for horses. They circled a distance of not more than fifteen miles, the appellant riding a bay mare called "Weazel." They stopped at Daly's for noon, and went to Hopper's, where they gathered two of their horses. On the way back, but some miles from the Schultz place, they saw some horses a short distance off which they thought might be others they were after, but did not go to them. They returned to the ranch between 3 and 4 o'clock, the appellant still riding Weazel. Here the appellant changed to the gray horse Comet and left again, saying he would not be gone long, but would bring back the horses they had seen on the way over. He returned about 11 o'clock without any horses. To ride from the ranch to Miles City, be there as late as 9:30, and return to the ranch about 11 was entirely possible, and appellant's subsequent efforts to account for his whereabouts during the period of his absence from the ranch were so unsatisfactory as to create the impression that



he could not safely tell the truth. Among other things, he persisted, until confronted by irrefutable proof, in the assertion that he did not return with Mrs. Schultz to the ranch, but left her on the way over from Hopper's to go after the horses they had seen, and that he had not mounted Comet at all on that day. He also induced Ray Wilson, a neighbor, to falsely say, for a time, that they had met near the Schultz ranch at about 8 o'clock that night. At 6:30 in the evening of November 29 Schultz had in his possession a \$10 gold certificate. No such certificate was found the next morning upon his body or among his effects. On December 1 the appellant met Mrs. Schultz in Miles City and asked her if she had gotten the \$10 bill out of the stovepipe hole at the ranch-house. She did not know that such a bill was there, but she at once dispatched a messenger thither at a cost of \$6, who found a \$10 gold certificate at the place mentioned, returned with it, and gave it to Mrs. Schultz, who immediately changed it into silver. On the same day, at another time, after she, but before he, had talked with the sheriff, he asked her what she had told the sheriff. She narrated what she had said, not word for word, but substantially. About two weeks after the murder the appellant left the state for his parents' home in Missouri, taking with him the clothes and some trinkets belonging to Mrs. Schultz; and the next day Mrs. Schultz followed him there. While there the appellant told her at least twice that he had killed Paul Schultz, demanding that she give him \$1,000 and certain property, else he would deliver himself up and say that she hired him to do it. On one of these occasions he told her that he had left town by the old (and less frequented) route, that he broke the light in Paul's barn, and that when Paul came in to turn on the light he hit him. Frequently, commencing with the summer of 1916, the appellant and Mrs. Schultz had talked of her relations with Schultz, of Schultz's unwillingness to free her and divide the property, and of the fact that upon appellant's father's place in Missouri there was a mortgage of \$1,000 which appellant was anxious to lift. Mrs. Schultz and the appellant were both ar-

rested early in January, 1917. On the way back the appellant, responding to the questions of the officers, gave an admittedly false account of his doings and whereabouts on the afternoon and evening of November 29. Incarcerated in the county jail at Miles City, the appellant was given a cell mate named James Smith, who knew nothing of the facts or details of the murder, but who was directed to learn what he could from the appellant. They had several conversations, the substance of which Smith gives thus: "I accused him of the killing of Schultz, and he never denied it, but he never owned up to it. I accused him time and again for being such a cold-blooded murderer, but he never said he didn't and he never said he did. Lots of stuff was said between us. We talked about the town that he was arrested in back in Missouri. He said he saw Lena Schultz in jail in Missouri. I asked him if he thought Lena would go against him, and he jumped out of the bunk, but didn't say anything except that if Lena should prosecute him she would get herself into it. He told me that while she was in the county jail in Missouri she was lying on the floor crying, and he said there was a door with a crack in it, and he went up and said to her, 'Ain't you sorry now in giving this up?' or 'coughing this up?' I asked him if she knew anything about the case, but he never told me. When I accused him of killing Paul Schultz, sometimes he would laugh, and sometimes he would go in his bunk and lay down, and at last he got awful restless, and I said, 'When you knocked Schultz in the head why didn't you cover him up?' He said, 'I did put a horse blanket under his head to keep the blood from running on the floor.' I asked him if he killed the old man why he did not kill the old lady, and he said, 'It takes time to do that'; and I says, 'You ought to take the time and put her away.' Yes; Logan thought I was crazy; he believed I was off." Upon the trial it developed that the first statement given the authorities by the appellant concerning his whereabouts and doings on November 29 tallied with that given by Mrs. Schultz, and this was admittedly wrong and intended to mislead. It also tallied in a very important

particular, as did his later statements, and his testimony, with what the witness Ray Wilson had told the authorities, but which Wilson pronounced on the stand to have been entirely false and agreed to beforehand. In his testimony the appellant was manifestly unwilling to either admit or deny certain of his previous statements, but stood upon the flat denial that he had killed Paul Schultz or had been in Miles City on the night of the murder and upon an explanation of his whereabouts and conduct which was inherently improbable. In short, the state made a *prima facie* case, and this was strengthened rather than refuted by the appellant himself, whose shifty and unsatisfactory testimony as a witness in his own behalf is apparent even on the printed page.

It is quite true, as he now insists, that some explanation of [1] contradictions and evasions is suggested by the fact that he was only nineteen years of age, and was confronted with the most serious charge to which anyone may be subjected; that the evidence against him comes from persons some of whom are not themselves above suspicion, some of whom, like Mrs. Schultz, had also made prior inconsistent statements, and some of whom are contradicted by other evidence, and that no motive adequate to a cautious and well-balanced mind was established. It will answer to say that all this was for the jury in the first instance and for the trial judge upon the motion. They saw and heard the witnesses, and were best able to gauge the value of their testimony. We may, however, add these two suggestions: That no attack upon Mrs. Schultz or Ray Wilson can avail, for, upon the facts established, any complicity on their part is impossible save as accomplices of the appellant, and [2] that the law does not require an adequate motive to be shown. (*State v. Lucey*, 24 Mont. 295, 61 Pac. 994.) Of motives it can be said that they are as various as are human characteristics, and what to us would seem trivial and of no impulsive force might conceivably appeal to someone else with commanding power. From this point of view the record is not barren. The relations between the appellant and Mrs. Schultz

or his expressed desire for money and property from her may be regarded as at least suggestive.

II. Motions for new trial because of newly discovered evidence [3] are not favored in the law, and in passing upon them the courts of this state are bound by the following rules: That the evidence must have come to the knowledge of the applicant since the trial; that failure to discover it sooner was not due to want of diligence; that it is so material that it would probably produce a different result upon another trial; that it is not cumulative merely—that is, does not speak as to facts in relation to which there was evidence at the trial; that the application must be supported by the affidavit of the witness whose evidence is alleged to have been newly discovered, or its absence accounted for; that the evidence must not be such as will tend only to impeach the character or credibility of a witness, and that it will likely be available upon another trial. (*State v. Matkins*, 45 Mont. 58, 68, 121 Pac. 881.) Viewed in the light of these rules, the order denying a new trial cannot be successfully assailed. The alleged newly discovered evidence is set forth in twenty-five affidavits, and the showing of diligence in the twenty-sixth. It is insisted that these affidavits establish or tend to establish the following propositions:

“(1) That Lena Schultz did not learn from the defendant on the morning of December 1 that there was a \$10 bill at the ranch, but that she knew and stated on the previous day, before the arrival of defendant in town, that she had such a bill there.

“(2) That the defendant on December 23, 1916, at the Van Laningham place, near Novinger, Missouri, did not make any statements to Lena Schultz, or at all, in relation to the murder of her husband.

“(3) That the defendant did not walk with Lena Schultz from the Van Laningham place to the Pope place on January 5, 1917, or make any admissions or statements to her on said date in relation to the murder.

“(4) That the state's principal witness, Lena Holt, formerly Lena Schultz, before and after the trial made numerous statements at variance with her testimony.

"(5) That the witness James Smith admitted having committed a forgery, and agreed with the county attorney to plead guilty, and that after testifying against the defendant refused so to plead and was discharged without trial.

"(6) That Paul Schultz was not killed at 9:05 P. M., when he went to the barn to water and feed his horses, but some time later, when he started to the pump for a pail of water, and that his body was carried into the barn.

"(7) That the route from Miles City to the Schultz ranch *via* the west Yellowstone bridge and Siem ranch is three miles farther than the direct road, and that it would take two hours and fifteen minutes to make said trip.

"(8) That in view of the testimony of Ike Davidson and of the witness Lena Holt as to the time the former arrived at the Schultz ranch-house on the evening of the murder, and the affidavits of Adolphine Schultz and George Kircher, it would have been a physical impossibility for the defendant to have committed the murder and to have admitted Davidson on his arrival at the Schultz ranch."

To these we may add:

(9) That during the trial Lena Schultz was overheard by Mr. and Mrs. Tiemans to say to her present husband, the witness Amos Holt, "We will swear him so damned far into hell that he will never bother us," Holt answering, "Just leave it to me," and also that Lena Schultz herself was heard on another occasion to say that she was indebted to Ray Wilson in the sum of \$500.

Propositions 2 and 3, with the affidavits supporting the same, [4] may be dismissed at once as presenting matters purely cumulative. A clear-cut issue of fact was made upon the trial as to whether the incidents referred to occurred, and the alleged details thereof, *pro* and *con*, were gone into by deposition of some of the very persons who make the present affidavits.

Proposition No. 1 was likewise an issue of fact at the trial. It is based upon affidavits from residents of Miles City, one of whom was a witness whose testimony justified examination along

the very lines here developed. The others were within the range of a diligent investigation before the trial, and no satisfactory showing is made for the failure to have their testimony.

Proposition No. 4 adds nothing new to the case whatever, [5] unless it be the alleged declaration of Lena Schultz after the trial "that they had got the wrong man." This she denies in her counter-affidavit, and the circumstances given in connection with the alleged statement are such that we cannot impute abuse of discretion to the court for accepting her version of what took place.

We are at a loss to appreciate the value of proposition 5. [6] That Smith was in jail on a felony charge was known at the trial. That he was made a cell mate of the appellant in order to get information was also acknowledged. What is now urged merely goes to his credibility, and all the considerations which might affect the credibility of a man in his situation were canvassed before the jury.

Proposition 6 is very important, if true, but the fact stated, [7] to-wit, that Paul Schultz's pail was found in the alley between his house and the pump, is too slender a predicate for the proposition, even if it be conceded, as stated by the deponent, that Schultz's habit was to draw a pail of water the last thing before going to bed at night. It assumes that the pail could have gotten where it was found in no way except that Paul dropped it there as he was struck down in the alley, which is by no means certain, and it leaves out of account the facts that no drops of blood, no signs of a struggle, no impression of a fallen body, no footprints of men, are mentioned at the trial or in the affidavits to show that Paul had been in the alley or was assailed there or carried to the barn; and it likewise ignores the broken light in the barn. As aptly stated by the trial judge, the finding of the pail, standing alone or considered in connection with all the other alleged newly discovered evidence, cannot be regarded "as of such a character as to render a different verdict reasonably probable upon a retrial."

Propositions 7 and 8 rest upon an affidavit by the witness [8] Kircher, touching an experimental ride from Miles City to the Schultz homestead *via* the west bridge. The experiment is indecisive for several reasons. In the first place, it was not made under conditions similar to those predicated in the evidence. He was hampered by snow, had not the same horse, was not the same rider, did not possess the same incentive to hurry. Again, the narrow margin of time depends upon whether it be assumed that appellant returned to the ranch at precisely 11 o'clock or "about 11," as testified, and whether Schultz turned on the water at 9:05, as the Shermans think, or was killed between 8 and 9, as appellant told Mrs. Schultz. The latter hypothesis is not impossible, because the water could have been turned on by the appellant himself. Finally, Kircher's affidavit is in the last analysis a mere expression of opinion, contrary to that given by him upon the trial as well as to other evidence in the case.

As to proposition 9: Lena Schultz and her husband both denied the statements imputed to them in the Tiemans affidavits, [9] and excellent reasons are assigned by the trial judge for refusing credit to the affidavits. It will suffice us to say that the statements, if true and if they applied to the appellant in this case, were known to his counsel before the close of the trial, and are therefore not newly discovered evidence. (29 Cyc. 885.) Regarding the statements imputed to Lena Schultz that she was indebted to Ray Wilson, which were also denied, their office could only be to impeach her or to inculcate both of them; but to inculcate either as an actual perpetrator is upon all the evidence, including that of the appellant, impossible; and to inculcate either as an accessory does not tend in this case to destroy the conclusion that the actual perpetrator was the appellant. Hence these statements are without value as inducements for a new trial.

It is noteworthy that no complaint is made of any rulings in the course of the trial or of the instructions. The appellant

was fairly tried, and painstaking consideration was obviously given to his motion for a new trial.

We find no error. Therefore the judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied June 27, 1918.

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MOELLEUR, RESPONDENT, v. MOELLEUR, APPELLANT.

(No. 3,903.)

(Submitted May 1, 1918. Decided May 24, 1918.)

[173 Pac. 419.]

*Husband and Wife—Alienation of Affections—Right of Action—Defenses—Punitive Damages—Evidence—Admissibility—Sufficiency.*

*Husband and Wife—Alienation of Affections—Right of Action.*

1. A wife cannot maintain an action for the alienation of the affections of the husband if it appears that the latter voluntarily bestowed them on defendant, she having done nothing wrongful to win them.

[As to wife's right to sue for alienation of husband's affections, see notes in 28 *Am. St. Rep.* 217; 46 *Am. St. Rep.* 472.]

*Same—Defenses.*

2. The fact that husband and wife had quarreled frequently does not bar the latter from recovery in an action for damages for alienation of the husband's affections.

*Same—Domestic Trouble—Evidence—Admissibility.*

3. Evidence of domestic trouble between husband and wife may properly be considered by the jury in mitigation of damages sought in an action for the alienation of the husband's affections.

*Same—Defenses.*

4. Estrangement between husband and wife is no defense in an action for alienation of affections, inasmuch as the wife had a right to rely upon the possibility of reconciliation so long as the relationship of husband and wife had not been severed.

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On the question of effect of fact that husband or wife of plaintiff in action for alienation of affections was the active and aggressive party, see notes in 16 *L. R. A. (n. s.)* 742; 43 *L. R. A. (n. s.)* 332,



**Same—Evidence—Sufficiency.**

5. Evidence in an action for the alienation of affections *held* sufficient to sustain the jury's finding that defendant was the procuring cause of the estrangement between plaintiff and her husband.

**Same—Appeal—Conflicting Evidence—Review.**

6. Where the evidence is in sharp conflict and that of plaintiff does not appear so inherently improbable that it cannot be true, a verdict for plaintiff will not be disturbed.

**Same—Punitive Damages—Malice—Jury Question.**

7. Punitive damages may be awarded in an action for the alienation of a husband's affections, even though the evidence furnishes no basis for a finding of malice, since malice may be implied from the conduct of defendant in causing the wrong complained of, its existence being a question for the jury.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Eugenia Moelleur against Mary Moelleur, formerly Mary Reynolds. Judgment for plaintiff and defendant appeals. Affirmed.

*Messrs. Walker & Walker* and *Mr. J. M. Ward*, for Appellant, submitted a brief; *Mr. Frank Walker* argued the cause orally.

*Messrs. William* and *Harry Meyer*, for Respondent, submitted a brief; the former argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff brought this action to recover damages for the alienation of her husband's affections and prevailed in the lower court. Defendant appealed from the judgment and from an order denying a new trial. The only contention made in this court is that the evidence is insufficient to support the verdict.

Plaintiff and her husband, Dr. Moelleur, lived together in the town of Melrose, where defendant, then Mrs. Mary Reynolds, a widow, also resided. Prior to Christmas, 1914, plaintiff and her husband had frequently engaged in family quarrels, but, according to plaintiff, had at the date mentioned become reconciled and were living happily. About that time Dr. Moelleur

began paying attention to Mrs. Reynolds, and about the same time began to display marked indifference to his wife, and this indifference increased until finally he refused to recognize her on the street or speak to her in their own home. On March 27, 1915, plaintiff secured a divorce from her husband, and on June 1 following, Dr. Moelleur and Mrs. Reynolds were married. Appellant concedes that Dr. Moelleur's affections were alienated, but contends that the evidence discloses that plaintiff's own acts and conduct were responsible for it, and that defendant was not an active or procuring agency in the estrangement.

1. The rules of law governing an action of this character are well settled.

(a) This action cannot be maintained if it appears that Dr. [1] Moelleur voluntarily bestowed his affections on Mrs. Reynolds, the latter doing nothing wrongful to win them. (*Claxton v. Pool*, 182 Mo. App. 13, 167 S. W. 623; *Scott v. O'Brien*, 129 Ky. 1, 130 Am. St. Rep. 419, 16 L. R. A. (n. s.) 742, 110 S. W. 260; 13 R. C. L. 1464.)

(b) Even though plaintiff's conduct toward her husband was [2, 3] a subsidiary cause of alienation, she is not barred from recovery; but the fact of their domestic trouble might be considered by the jury in mitigation of damages. (*Morris v. Warwick*, 42 Wash. 480, 7 Ann. Cas. 687, and note 689, 85 Pac. 42; *Baird v. Carle*, 157 Wis. 565, 147 N. W. 834; *Hadley v. Heywood*, 121 Mass. 236.)

(c) Even though there had been estrangement between plaintiff [4] and her husband, so long as they remained husband and wife, plaintiff had the right to rely upon the possibility of reconciliation, and defendant had no right to intermeddle, and, if she did so, she must answer for the consequences. (*Rott v. Goehring*, 33 N. D. 413, Ann. Cas. 1918A, 643, and note 647, L. R. A. 1916E, 1086, 157 N. W. 294; *Müller v. Pearce*, 86 Vt. 322, 43 L. R. A. (n. s.) 332, 85 Atl. 620; 13 R. C. L. 1465.)

The jury was authorized to believe the evidence offered on behalf of plaintiff and refuse to accept defendant's theory of

the case. In this view we assume that plaintiff's version was accepted, and if the evidence offered in her behalf, with the legitimate inference to be drawn from it, will justify a verdict in her favor, we are not at liberty to interfere.

In a case of this character the evidence must of necessity [5] be largely circumstantial. No other person than Dr. Moelleur can state positively that the actions of defendant did or did not prejudicially influence his conduct toward his wife; but if the jury believed, as they might, that prior to Dr. Moelleur's association with defendant he and plaintiff were living together as husband and wife, that the defendant, intending to entice Dr. Moelleur from his marital relations and duties, employed means reasonably calculated to effect her purpose, and Dr. Moelleur's affections were alienated from his wife, and that soon after the divorce Dr. Moelleur and defendant were married, then a finding that defendant was the active, procuring cause of the estrangement is a legitimate inference to be drawn from the evidence.

On behalf of the plaintiff the testimony tended to show that between Christmas, 1914, and March, 1915, Dr. Moelleur had brought Mrs. Reynolds from Butte in his automobile, arriving at Melrose after midnight; that on another occasion he took her in his machine to Dewey Flat and had dinner with her; that Mrs. Reynolds expressed her great pleasure in Dr. Moelleur's company, her desire to ride with him, and her admiration for him; and that when they returned from Dewey Flat she asked Dr. Moelleur when they were going to take another ride, to which he responded, "Almost any time," and she replied that she would be ready; that defendant stated that Dr. Moelleur was such a lovely man to be with, such good company, that she enjoyed his company so much, and that she would like to have him; that Dr. Moelleur and Mrs. Reynolds met frequently at the house of Dr. Moelleur's sister, and that, on the morning the papers announced that plaintiff had instituted divorce proceedings, defendant in a conversation with a neighbor said: "Did you folks see in the paper what I have done?" These

facts furnish sufficient justification for the jury's finding that defendant was a procuring cause of the estrangement between plaintiff and her husband and that she intended the consequences which actually followed. (*Dodge v. Rush*, 28 App. D. C. 149, 8 Ann. Cas. 671.)

The evidence is in sharp conflict. If that offered by defendant had been accepted as true, a different result must have been reached; but the jurors were the judges of the credibility of the witnesses, and, since there is not anything to indicate that plaintiff's evidence is so inherently improbable that it cannot be true, we are bound by the verdict.

2. The verdict awarded \$2,400 compensatory damages and [6] \$100 punitive damages. The trial court required plaintiff to remit \$1,000 of the total amount as a condition to the order overruling the motion for a new trial. It is insisted that the evidence does not authorize any award of punitive damages even though it may sustain the verdict for compensatory damages. Section 6047, Revised Codes, provides: "In any action for a breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant." If we assume that any part of the award of exemplary damages attaches to the judgment at present, we are nevertheless unable to agree with counsel for appellant that the evidence furnishes no basis for a finding of malice.

In *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, it is said: "The term 'malice,' as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. \* \* \* If the conduct of the defendant was unjustifiable and actually caused the injury complained of by plaintiff, which was a question for the jury, malice in law would be implied from such conduct." This is the rule recognized and enforced

by the courts generally (*Boland v. Stanley*, 88 Ark. 562, 129 Am. St. Rep. 114, 115 S. W. 163; *Sickler v. Mannix*, 68 Neb. 21, 93 N. W. 1018; 3 Words and Phrases, 2d ed., 224), and under it the question of the existence of malice was properly submitted to the jury.

We find no error in the record. The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

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TEAGARDEN, APPELLANT, v. CALKINS ET AL., RESPONDENTS.

(No. 3,904.)

(Submitted May 1, 1918. Decided May 25, 1918.)

[173 Pac. 549.]

*Real Property—Option Contracts—Value of Option—Measure  
of Damages—Appeal—Findings—Conflicting Evidence.*

*Appeal and Error—Findings—Conflicting Evidence.*

1. The findings of the district court made in a law action tried without a jury will be accepted as final on appeal if there is any substantial evidence to support them.

*Real Property—Option Contracts—Value.*

2. The value of an option on land is not in all cases the difference between the value of the land and the face of the option.

[As to the principle that the power to option is not included in the power to sell, see note in *Ann. Cas.* 1914C, 366.]

*Same—Value of Option—How Measured.*

3. An option is a mere right to purchase upon certain terms, its value depending upon its desirability, as measured by the time it has to run, the terms of payment, the existence of a market for the property, etc.

*Same—Option—Rights of Joint Holders.*

4. In the absence of fraud, the measure of damages in an action by one of two joint holders of an option on land (about to expire) to recover his share of the value of the option upon sale thereof by the other, held under the circumstances to have been one-half the amount the seller actually received and not the difference between the value of the land at the time and the face of the option.

*Appeal from District Court, Meagher County; John A. Matthews, Judge.*

ACTION by Sam W. Teagarden against R. M. Calkins, Jr., and F. P. Marrs, as administrator of the estate of A. C. Graves, deceased. From judgment for plaintiff and an order denying him new trial, plaintiff appeals. Affirmed.

*Mr. Wellington D. Rankin*, for Appellant, submitted a brief and argued the cause orally.

*Messrs. Jones & Jones* and *Messrs. Purcell & Horsky*, for Respondents, submitted a brief; *Mr. Antone J. Horsky* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Upon appropriate pleadings and after trial upon the evidence the lower court found in substance these facts: That on or about May 10, 1908, George W. Moore granted an option to purchase certain real estate owned by him amounting to 8,820 acres, situate in Meagher and Sweetgrass counties in this state. By its terms the option expired July 1, 1908, and it ran to A. C. Graves, but Graves and the plaintiff Teagarden were joint and equal owners of it. Later, and within ten days of its expiration Graves, without consulting Teagarden, sold the option to R. M. Calkins, Jr. The price paid was \$50, but Calkins agreed that if he should make anything out of the deal he would "remember" Graves. The value of the option was "problematical," and Calkins procured another and more liberal one from Moore under which he sold the property at a substantial profit long after the expiration of the Graves-Teagarden option; but Calkins "remembered" Graves to the extent of \$500. Before this action was brought, Graves died and the defendant Marrs was duly appointed administrator of his estate.

As conclusions of law it was declared that "in the absence of actual proof of fraud, Graves will be deemed to have done the

best he could with an option about to expire," and that "the plaintiff Teagarden is entitled to a judgment against the estate of A. C. Graves, for one-half the sum of \$550, with interest from June 10, 1908," and costs. Judgment was entered accordingly, and from it, as well as from an order denying him a new trial, Teagarden appeals.

In his brief, the appellant makes four contentions, but upon the argument all of these save the last were waived. The contention relied on as ground for reversal is "that the value of the option was not problematical, but, on the contrary, was shown by the evidence to be at least \$8,820." In other words, [1] the question is one of fact, and as this was a law action tried by the court sitting without a jury, we will not determine where the apparent weight of the evidence may be, but are obliged, upon principles too well settled for discussion, to accept the findings respecting value if there is any substantial evidence to support them. That there is such evidence cannot for a moment be doubted. Calkins and Glenn both testified categorically that the option was practically worthless, Calkins explaining that the chief reason for paying the \$50 was to get it out of the way for the new option he had arranged to secure, and that the \$500 subsequently paid was in recognition of general services, including the Moore transaction, which had been rendered by Graves to the company with which Calkins was connected. Counsel says: "The plaintiff testified that the land was worth \$7.50 per acre. This testimony was not contradicted by the defendant. It needs no argument to convince one that, when land has a value of \$7.50 per acre, and a person holds an option on the same land for \$5.50 per acre, the option is worth \$2 per acre." We cannot agree that there is no dispute as to the value of the land when the option was sold; but, assuming the premise stated, we think that both as a matter of law and of common experience a great deal of argument would be [2, 3] necessary to establish that the value of an option is in all cases the difference between the value of the land and the face of the option. An option is a mere right to purchase

upon certain terms; its value depends upon its desirability, and this in turn upon many things such as the time it has to run, the terms of payment, the existence of a market for the property, *etc.*

Counsel argues that loss of profits may be recovered in a suit by the option grantee against the option grantor for refusal to convey according to the terms of the option. Grant this to be true, it has no relevancy here, because it depends upon conditions not pertinent to nor present in this case. Here either owner could sell, and each was at the mercy of the other's honest judgment and discretion. Hence, in the absence of fraud, the [4] measure of plaintiff's recovery was limited by what Graves actually got for the option; and the only suggestion in the record that Graves got anything more than the court found is disclosed in a deposition so properly rejected by the court that no complaint is made of such rejection at this time. Aside from this, the value of the option is a matter of substantial conflict, and the trial judge cannot be put in error for resolving it against the plaintiff, even though a different conclusion from that adopted was possible.

The judgment and order appealed from are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.



BUTTE LAND & INVESTMENT CO., APPELLANT, v. WILLIAMS, RESPONDENT.

(No. 3,913.)

(Submitted May 3, 1918. Decided May 25, 1918.)

[173 Pac. 550.]

*Real Estate Brokers—Commission—Failure to Conclude Sale—Abstract of Title—Duty of Seller.*

**Real Estate Brokers—Furnishing Abstract of Title—Duty of Seller.**

1. Defendant listed with plaintiff, a real estate dealer, a town lot for sale on a commission basis, the former agreeing, among other things, to furnish an abstract of title to date of sale. The abstract thus furnished showed two apparent defects in the title, both easily correctible by reference to the original records. Plaintiff found a buyer and demanded of defendant that she correct the abstract and make good the title. *Held*, that the demand to make good the title did not exact of defendant an impossibility not required by the contract.

**Same—Failure to Conclude Sale—Commission.**

2. A real estate broker with whom property is listed for sale on a commission basis is the seller's agent for the purpose of effecting—not defeating—a sale; hence where a broker after discovering a supposed (but not real) defect in the abstract of title advised a prospective purchaser not to buy, after refusal of the owner to correct the abstract at her expense, was not entitled to recover his commission.

[As to when a broker becomes entitled to a commission, see note in 28 Am. St. Rep. 546.]

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by the Butte Land & Investment Company against Icie Williams. Judgment, and plaintiff appeals. Affirmed.

Cause submitted on brief of Appellant.

*Messrs. Nolan & Donovan*, for Appellant.

MR. JUSTICE SANNER delivered the opinion of the court.

The respondent listed a town lot in Butte with the appellant to be sold for \$1,400, the appellant to receive a commission of

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On the right of real estate broker to commissions where sale fails because of defects in employer's title, see note in 43 L. R. A. 609.

five per cent and she agreed that she would "furnish an abstract of title to date of sale, \* \* \* and to convey said property by good and sufficient deed clear of encumbrances" to the appellant or its nominee. The respondent furnished an abstract which the appellant brought down to date; but, as completed, the abstract showed two apparent defects in the title, *viz.*, a deed of the property on June 24, 1891, to John W. Fowler, followed by a deed of the same date from James W. Fowler, and a mortgage in 1907 to Augusta Y. Scott, followed by an assignment of said mortgage by Minnie Rowe and Freda Harkins "as devisees and legatees under the last will" of Augusta Young Scott, and a satisfaction of such mortgage by the assignee named. Both of these were sins of the abstractor—the one of commission, the other of omission—easily correctible by reference to the original records; in fact the appellant satisfied itself, with reference to the mortgage transaction, that the assignors were the devisees of the original mortgagee, entitled as such to make the assignment. Appellant found a buyer for the property, notified respondent accordingly, and demanded that she correct the abstract as to the mortgage transaction and make good the title as to the Fowler conveyances. This she refused to do, claiming that the contract she made absolved her from any and every expense save the commission. The purchase was not completed and the appellant, claiming this was due to the defendant's failure to furnish the abstract, sued for its commission. Upon the trial a verdict was directed for the respondent, and, judgment being entered accordingly, this appeal is the result.

As reasons for the order directing a verdict, the trial judge [1] assigned: (1) That in its demand to make good the title, the appellant had exacted from the respondent an impossible thing not required by the contract; and (2) that the sale fell through on the advice of the appellant itself. Only from an *ultra* technical point of view, which we are loath to adopt, could the first of these propositions be sustained. The respondent

had agreed to furnish an abstract and to convey title, and obviously the purpose of the abstract was to show that title could be conveyed by her. Upon examination of it the appellant thought the title, as shown by the abstract, defective; it could therefore properly indicate the corrections which the abstract seemed to require; this was done, and the language used with reference to the Fowler transfers must be taken as a demand, not to make good a title which was in that particular faultless, but to correct whatever needed correction, *viz.*, either the title or the abstract.

The second proposition of the trial court is a different matter. [2] The evidence makes it clear that the purchaser never saw the abstract, found no fault with the title, had no knowledge of the objections; she may, so far as the evidence shows, have taken the property notwithstanding the objections, chancing the reality or the importance of the apparent defects; what she did take was the appellant's word whether the title was good or not, and, being so governed, did not buy the property. We think that this is ample to sustain the court's position. The appellant was respondent's agent to effect—not to defeat—a sale of the property, and though it was not bound to impose upon the purchaser a title thought to be defective, it could not on the one hand advise against the purchase because the title was bad when in fact it was good, and on the other hand claim its commission for finding a buyer able and willing to buy. Its duty was to pass the abstract to the purchaser and permit her to say whether, in view of the actual facts as she might ascertain them, or of the lapse of time since the Fowler conveyances, or of the likelihood that the mortgage assignment and satisfaction were regular, she would care to take the property. Nor is the appellant's situation altered for the better by the fact that it was advancing part of the money for the purchase; the buyer might procure the money elsewhere. That in the attempt to serve three masters, to-wit, the respondent, the purchaser, and itself, the appellant lost the sale is clear; and it is

equally clear that the appellant cannot impose the cost and responsibility for that loss upon the respondent alone.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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ENTERPRISE SHEET METAL WORKS, RESPONDENT, v  
SCHENDEL, APPELLANT.

(No. 3,906.)

(Submitted May 2, 1918. Decided May 27, 1918.)

[173 Pac. 1059.]

*Corporations—Unpaid Stock Subscriptions—Recovery—Condition Precedent—Complaint—Insufficiency—Waiver.*

*Corporations—Stock Subscriptions—Payment—Implied Condition.*

1. When a subscription is made to the capital stock of a corporation the amount of which is specified in the charter, articles of incorporation, or in the contract of subscription, and there is nothing disclosing a contrary intention, the subscription is made upon the implied condition that the whole amount shall be subscribed before the subscriber may be lawfully called on to pay, except for the preliminary expenses.

[As to the liability to the corporation undertaken by subscribers to its stock, see note in 40 Am. Dec. 358.]

*Same—Unpaid Stock Subscriptions—Action to Recover—Complaint.*

2. The above rule not having been modified by statute in this state, the complaint in an action by a corporation to recover an unpaid stock subscription is fatally defective if it does not disclose that all the capital stock has been subscribed.

*Same—Complaint—Insufficiency.*

3. The allegation that plaintiff was duly incorporated under the laws of the state by the subscribers to the subscription contract in pursuance of the terms thereof was not a sufficient averment that all the conditions of the contract had been fulfilled, but meant only that the corporation had gained a legal status to commence business if all the stock had been subscribed, or, if not, to solicit subscribers or sell shares.

*Same—Unpaid Stock Subscriptions—Payment—Rule—Modification.*

4. The settled rule of law that a subscriber to the capital stock of a corporation cannot be compelled to pay unless the whole amount shall have been subscribed is susceptible of annulment or modification by express provision of statute only.

**Contracts—Conditions Precedent—Pleading.**

5. In declaring upon a contract containing conditions precedent, a party may, under section 6572, Revised Codes, allege generally that he has performed all the conditions on his part, provided he couch the allegation in the terms of the statute or in terms equivalent thereto.

**Corporations—Unpaid Stock Subscriptions—Waiver.**

6. Since a "waiver" is the intentional relinquishment of a known right, acceptance of corporate stock subscribed for without knowledge that all of the stock had not been taken was not a waiver of the condition precedent requiring subscription of all the stock before liability attached.

**Same—Implied Waiver—What Constitutes.**

7. While a waiver may be implied by the conduct of the party against whom it is alleged, the circumstances must be such as to furnish the basis for an inference of knowledge and intention to forego the right which he might have asserted.

**Same—Unpaid Stock Subscriptions—Recovery—Rule—Modification.**

8. *Held*, that the contention that section 3825, Revised Codes, as amended (Laws 1909, p. 148); section 1, Chapter 94, Laws 1909, p. 124; sections 3818 and 3889, Revised Codes, as amended (Laws 1915, Chap. 88); and sections 3829, 3840, 3867 and 3897, Revised Codes, have in effect modified the general rule requiring that the whole amount of the capital stock of a corporation must be subscribed before a subscriber may be called upon to pay, has no merit, and that the general rule, therefore, is controlling in this state.

*Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.*

**ACTION** by the Enterprise Sheet Metal Works against Robert E. Schendel. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded, with leave to amend.

*Messrs. Waldo & Cunningham*, for Appellant, submitted a brief; *Mr. Wm. B. Waldo* argued the cause orally.

One who signs, as defendant did, a subscription paper by which he agrees to take stock in a corporation thereafter to be formed, may withdraw his subscription at any time before the corporation is formed. So-called subscriptions to the capital stock of a corporation not yet formed are merely offers to subscribe. (*Deschamps v. Loiselle*, 50 Mont. 565, 148 Pac. 335, 337; *Bryant's Pond Steam Mill Co. v. Felt*, 87 Me. 234, 47 Am. St. Rep. 323, 33 L. R. A. 593, 32 Atl. 888; *Planters' & M. Ind. Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529,

46 South. 977, 978; *Hudson R. E. Co. v. Tower*, 156 Mass. 82, 32 Am. St. Rep. 434, 30 N. E. 465; *Midland City Hotel Co. v. Gibson*, 11 Ga. App. 829, 76 S. E. 600.) Notice of withdrawal may be given to another subscriber prominent in the enterprise or who is in charge of subscription paper. (*Planters' & M. Ind. Packet Co. v. Webb*, 156 Ala. 551, 16 Ann. Cas. 529, 46 South. 977; *Hudson R. E. Co. v. Tower*, 161 Mass. 10, 42 Am. St. Rep. 379, 36 N. E. 680.) If the offer be not withdrawn, it will ripen into a binding contract when the corporation comes into being and accepts it. (1 Thompson on Corporations, secs. 521, 543.)

It is held that when the subscription paper specifies the amount of the capital stock of the proposed corporation [and this one does], subscription of the full capital is a condition precedent to liability of any of the signers. (*Salem Mill Dam Corp. v. Ropes*, 23 Mass. (6 Pick.) 23; *Livesey v. Omaha Hotel Co.*, 5 Neb. 50; *Stearns v. Sopris*, 4 Colo. App. 191, 35 Pac. 281; *Atlantic Cotton Mills v. Abbott*, 9 Cush. (Mass.) 423; *Santa Cruz R. R. Co. v. Schwartz*, 53 Cal. 106; *Rockland etc. Co. v. Sewall*, 78 Me. 167, 3 Atl. 181.)

When the articles of incorporation are required to state the amount of capital stock and the number of shares into which it is divided, and our law so requires, full subscription of the amount of the capital stock is a condition precedent to liability of any subscriber. (*Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, 72 Atl. 399; *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481; *International F. & E. Co. v. Walker*, 88 Mich. 62, 49 N. W. 1086; *Exposition etc. Co. v. Canal St. etc. Co.*, 42 La. Ann. 370, 7 South. 627; *Temple v. Lemon*, 112 Ill. 51, 1 N. E. 268.)

Waiver must be pleaded, and knowledge, being an essential element thereof, must be averred. (*Seebach v. Kuhn*, 9 Cal. App. 485, 99 Pac. 723; *List & Son Co. v. Chase*, 80 Ohio St. 42, 17 Ann. Cas. 61, 88 N. E. 120; *Symms-Powers Co. v. Kennedy*, 33 S. D. 355, 146 N. W. 570; *J. I. Case Thresher M. Co.*

v. *Loomis*, 31 N. D. 27, 153 N. W. 479; *Poheim v. Meyers*, 9 Cal. App. 31, 98 Pac. 65.)

*Messrs. Reynolds & Derry*, for Respondent, submitted a brief; *Mr. F. B. Reynolds* argued the cause orally.

Respondent does not concede appellant's contention that subscription to the full amount of the capital stock is such an implied condition precedent, but even though such contention should prevail, yet this requirement is satisfied by an allegation that the corporation was "duly incorporated." (*McKay v. Elwood*, 12 Wash. 579, 41 Pac. 619; *Milwaukee Brick etc. Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838; *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20.)

The promise to pay is absolute and is not in any sense dependent upon the full amount of the capital stock being subscribed. It must be presumed that the defendant knew the law relative to the organization of corporations as set forth in the statutes of the state, and that the subscription agreement must be construed in the light of the fact that the corporation could be organized and commence business with any portion of the capital stock having been subscribed. Such being the case, the subscription agreement must be construed as an absolute promise to pay upon the demand of the treasurer after the organization of the company, even though the full amount of the capital stock had not been subscribed, so long as no such condition was expressly attached to the promise to pay. (See *West v. Crawford*, 80 Cal. 19, 21 Pac. 1123.)

Where the statute authorizes the organization of a corporation upon subscription of less than the whole amount of the proposed capital stock, the rule requiring the subscription of the whole amount does not apply. (*Schloss v. Montgomery Trade Co.*, 87 Ala. 411, 6 South. 360; *San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Auburn Opera House etc. Assn. v. Hill*, 3 Cal. Unrep. 839, 32 Pac. 587; *Lincoln Shoe Mfg. Co. v. Sheldon*, 44 Neb. 279, 62 N. W. 480; *Astoria etc. R. Co. v. Hill*, 20 Or. 177, 25 Pac. 379; *Port Edwards etc. R. Co. v.*

*Arpin*, 80 Wis. 214, 49 N. W. 828; *Milwaukee Brick etc. Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.)

"The acceptance of the stock and the payment of the assessment thereon is a waiver of the objection that otherwise might have been urged upon the ground that all the shares had not been taken, if such was the fact." (*Inter-Mountain Pub. Co. v. Jack, supra.*)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action to recover of the defendant \$1,000, the par value of ten shares of its capital stock upon a subscription contract therefor. The complaint alleges: That on or about May 28, 1913, the defendant and other persons agreed to form a corporation to conduct a sheet metal business, and for that purpose signed the following agreement:

"We, the undersigned, in consideration of the mutual promises herein contained do hereby severally subscribe for the number of shares of the capital stock of the Enterprise Sheet Metal Works, a corporation proposed to be organized under the laws of the state of Montana, with a capital stock of \$30,000, of the par value of \$100 per share, and promise to pay therefor in cash, except as hereinafter provided, upon the demand of the treasurer of said proposed corporation after the organization thereof.

"The undersigned, H. B. Stridiron and John Sadring have heretofore been engaged in business as a partnership under the firm name of Enterprise Sheet Metal Works, and as such partners are joint owners of considerable personal property consisting of stock on hand, tools and machinery, bills receivable, accounts receivable, and a certain patent for the manufacture and sale of a certain flume, the equity in which H. B. Stridiron and John Sadring value at the sum of \$15,000.

"It is mutually agreed by and between the subscribers hereto that all said personal property shall be turned over by said H. B. Stridiron and John Sadring to said proposed corporation,



subject to their partnership indebtedness in payment of the stock hereinafter subscribed for by them and the same shall be received by said proposed corporation in full payment of 150 shares of the stock of said proposed corporation."

That defendant subscribed for ten shares of the stock of the corporation to be formed; that thereafter "the plaintiff was duly incorporated under the laws of the state of Montana by the subscribers to said subscription contract, in pursuance with the terms thereof"; that it ever since has been and now is engaged in the sheet metal business; that as such corporation the plaintiff succeeded to and acquired all the rights of said subscribers and each of them to the amount for which they subscribed; that plaintiff has issued its stock to its subscribers; that it "has issued and delivered to defendant ten shares \* \* \* in accordance with his said subscription contract, and that the same has been accepted by him; that he has refused to pay for the same or any part thereof, though the treasurer of the plaintiff has repeatedly demanded payment." Judgment is demanded for \$1,000, the subscription price, with interest thereon from April 25, 1915. The defendant interposed a general demurrer, which was overruled. Thereafter issues were joined by defendant's answer and plaintiff's reply thereto, a trial of which resulted in a judgment in favor of plaintiff. From this judgment and an order denying him a new trial, defendant has appealed.

The principal contention made by counsel is that the complaint does not state a cause of action. The argument is that subscriptions for the entire amount of the capital stock of plaintiff specified in the contract and in the articles of incorporation is a condition precedent which must have been fulfilled before the defendant became liable, and that, since the complaint contains no allegation of the amount that has been subscribed, nor any allegation that any of it other than that of the defendant has been subscribed for, it is fatally defective.

The rule is well established that, when a subscription is made [1] to the shares of the capital stock of a corporation the

amount of which is specified in the charter, articles of incorporation, or in the contract of subscription, and there is nothing disclosing a contrary intention, the subscription is made upon the implied condition that the whole amount shall be subscribed before the subscriber may be lawfully called on to pay for the shares contracted for or any assessment thereon, except for the preliminary expenses. (*Morgan v. Landstreet*, 109 Md. 558, 130 Am. St. Rep. 531, 16 Ann. Cas. 1247, and cases cited in note, 72 Atl. 399; 1 Thompson on Corporations, sec. 613; 7 R. C. L., p. 232, sec. 205; Morawetz on Corporations, sec. 146; Cook on Stock and Stockholders, sec. 176; 10 Cyc. 493.) The reason for the rule is stated by the authorities in varying terms, but in substance they are all in accord. In *Stoneham etc. R. Co. v. Gould*, 2 Gray (Mass.), 277, the court said: "It is a rule of law too well settled to be now questioned that when the capital stock and the number of shares are fixed by the act of incorporation or by any vote or by-law passed conformably to the act of incorporation, no assessment can be lawfully made upon the shares of any subscriber until the whole number of shares has been taken. \* \* \* This is no arbitrary rule; it is founded on a plain dictate of justice, and the strict principles regulating the obligation of contracts. When a man subscribes a share to a stock, to consist of 1,000 shares, in order to carry on some designated enterprise, he binds himself to pay a thousandth part of the cost of such enterprise. If only 500 are subscribed for, and he can have no assurance which he is bound to accept that the remainder will be taken, he would be held if liable to assessment, to pay a five-hundredth part of the cost of the enterprise, besides incurring the risk of entire failure of the enterprise itself, and the loss of the amount advanced toward it."

In *Livesey v. Omaha Hotel Co.*, 5 Neb. 50, the reason is stated thus: "The rule seems to be well established that, when the charter or subscription contract specifically fixes the capital stock at a certain amount, divided into shares of a certain amount each, the whole amount of capital so fixed and required

for the accomplishment of the main design of the company must be fully secured by a *bona fide* subscription before an action will lie upon the personal contract of subscribers to stock to recover an assessment levied on the shares of stock, unless there is some clear provision in the contract to proceed in the execution of the main design with a less subscription than the whole amount of capital specified. This rule seems to be founded on the principle that by the terms of the grant to the corporation it is essential to the power of assessment for the general objects and purposes of the institution that the whole capital stock required by the condition precedent must be represented and acted upon by the assessment."

In some states there are statutes which expressly provide that [2] assessments may be made or the purchase price demanded when a certain fractional part of the entire amount has been taken. (*San Bernardino Inv. Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Anvil Min. Co. v. Sherman*, 74 Wis. 226, 4 L. R. A. 232, 42 N. W. 226; 7 R. C. L. 205; 1 Thompson on Corporations, sec. 615.) Such statutes are held to modify the general rule so that each subscriber is presumed, when he subscribes, to give his consent to become liable when the corporation has been organized and subscriptions have been made to the required fractional amount of the entire stock. (7 R. C. L. 205.) But, whether the general or modified rule applies, the complaint or declaration does not disclose a liability unless it alleges facts showing that the condition precedent has been fulfilled; in other words, under the general rule, that all the capital stock has been subscribed, or, under the modified rule, that the fractional part has been subscribed. (*Livesey v. Omaha Hotel Co.* and cases last cited *supra*.) The general rule has not been modified by statute in this state. Tested by it, the complaint in this case is wholly insufficient and the demurrer should have been sustained.

Counsel for plaintiff insist that the allegation that "plaintiff was duly incorporated under the laws of the state of Montana

[3] by the subscribers to said subscription contract, in pursuance with the terms thereof," is a sufficient averment that all the conditions of the contract have been fulfilled. With this contention we do not agree. The allegation that the corporation was duly organized means no more than that articles of incorporation were formulated and record made of them with the proper officers as required by the statute (Rev. Codes, sec. 3825, as amended by Acts 1909, p. 148)—in other words, that the corporation has gained a legal status for one of two purposes; that is to say, if the capital stock has all been subscribed, the corporation at once acquires the capacity to enter upon the accomplishment of its main enterprise. If only formative shares have been taken by the persons effecting the organization, legal capacity has been acquired for no other purpose than to solicit subscribers, or to sell shares in order to secure the capital to carry out the main enterprise. "Organization, unlike the power to do business, does not necessarily contemplate the incurring of debts nor make available capital a necessity, and there seems to be no reason for relaxing the rule that liability on a subscription is conditional upon all the stock being taken simply because the corporation may organize before this." (7 R. C. L., p. 232, sec. 205.) The fact that several provisions of the Code, referred to later, imply that organization may be [4] effected prior to subscription for all the stock, does not require the conclusion that the legislature intended to set aside, annul or modify a settled rule of law founded upon a "plain dictate of justice and the strict principles regulating the obligations of contracts." In our opinion, nothing short of an express provision on the subject would suffice to accomplish this. The modifying phrase, "in pursuance with the terms thereof," is a mere bald conclusion. True, the statute (Rev. [5] Codes, sec. 6572) permits a party in declaring upon a contract containing conditions precedent to allege generally that he has performed all the conditions on his part. In order to avail himself of this permissive provision, however, the pleader must couch his allegation in the terms of the statute

or in terms substantially equivalent. (*Ivanhoff v. Teale*, 47 Mont. 115, 130 Pac. 972.)

Counsel contend that the allegation of a delivery of his [6] stock to the defendant and his acceptance of it is sufficient to obviate the necessity of alleging that all the stock has been subscribed. By this contention counsel seek to invoke the doctrine of waiver. This term is defined as "the intentional relinquishment of a known right." (Anderson's Dictionary.) "There can be no waiver unless the person against whom the waiver is claimed had full knowledge of his rights and of facts which will enable him to take effectual action for the enforcement of such rights. No one can acquiesce in a wrong while ignorant that it has been committed, and that the effect of his action will be to confirm it. To constitute a waiver on the part of one party to a contract of the performance of the contract on the part of the other party, it must be shown that the party alleged to have waived his rights had knowledge of what the other party had done contrary to the terms of the contract and what part thereof he had failed to perform; and if the contract is affirmed in ignorance of facts by which it is invalidated, there is no waiver of the right to rescind. \* \* \* The burden of proving knowledge is on one who relies upon a waiver, and such knowledge must be plainly made to appear. Certainly a presumption of waiver cannot be rested on a presumption that the right alleged to have been waived was known." (29 Am. & Eng. Ency. of Law, 2d ed., 1093-1095.)

To make the principle invoked available to plaintiff, therefore, it was incumbent upon it to allege facts showing knowledge by defendant that all the stock had not been subscribed, and that, having this knowledge, he nevertheless accepted that for which he had subscribed. The allegation in question falls short of this requirement; for it implies no knowledge as to how much of the stock had been subscribed. Indeed, it showed nothing further than that the defendant had agreed to take [7] ten shares and did take them. It is true that a waiver may be implied by the conduct of him against whom it is al-

leged; but the circumstances must be such as to furnish the basis for an inference of knowledge and intention to forego the right which he might have asserted. Such a case is not made out by the complaint.

In support of their contention in this behalf counsel cite the case of *Inter-Mountain Pub. Co. v. Jack*, 5 Mont. 568, 6 Pac. 20. That was an action to recover an assessment on shares of the capital stock of the plaintiff. The territorial court held that an allegation in the complaint that the defendant had accepted the shares and made payment of one assessment thereon was sufficient to show a waiver by him of his objection made by general demurrer that all the shares had not been taken. In our opinion, the court was in error, in that it did not appear from the complaint that the acceptance and payment were made by defendant with knowledge that all the shares had been taken. Even so, it is distinguishable from this case in that it is alleged in the complaint here that the defendant has repeatedly refused payment.

Counsel admit that the general rule governing stock subscriptions applies in the absence of legislation modifying it, but insist that several provisions of the Codes relating to corporations have in effect done this, so that it now has no application in this jurisdiction. These provisions are: Amended section 3825, Laws 1909, p. 148; section 1, Chapter 94, Laws 1909, p. 124; amended sections 3818 and 3889, Laws 1915, Chapter 88; and sections 3829, 3840, 3867 and 3897. But none of them sustain the contention. To take them up and subject them to a critical examination would accomplish no beneficial result. It is sufficient to say of them that they contain no provision declaring what portion of the capital stock must be subscribed before the corporation is authorized to begin business. It is true that section 1, Chapter 94, Laws of 1909, *supra*, declares that the certificate issued by the secretary of state, as prescribed by amended section 3825, shall be *prima facie* evidence of the corporate character and capacity of the corporation and of its right to do business in this state; but this pre-

sumes a corporation with capital subscribed under the condition precedent implied by the general rule, or in accordance with an agreement had by the subscribers either at the time they made their subscriptions or thereafter when they conceived that the corporation could successfully carry on the business for which it was organized with the amount of capital stock subscribed. At best, these provisions, taken together with the others cited, which have to do with the mode of levying assessments, the holding of meetings, the method of voting, *etc.*, mean nothing more than that the legislature enacted them to enable the subscribers to fix by convention among themselves the amount of capital stock necessary to enable the corporation to begin business. They do not imply that every corporation after subscription has been obtained in any number of shares less than the whole specified in the articles may engage in the enterprise for which it was organized. Nor, we think did it intend to enable or permit a corporation to deal with the public in an attempt to accomplish its main enterprise, until it has at its command a sufficient capital to warrant a reasonable expectation of its success. True, amended section 3825 permits three or more persons who have taken a nominal amount of stock to perfect an organization. But, as we have said above, the legal status thus acquired must be understood to be limited to preliminary work of securing capital by the co-operation of others; otherwise the *prima facie* capacity evidenced by the certificate of the secretary of state would be the warrant for the perpetration of gross fraud upon the public, rather than for the conduct of some legitimate business enterprise.

The judgment and order are reversed, and the cause is remanded, with leave to plaintiff to amend the complaint if it desires to do so.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

**MAYNARD, APPELLANT, v. WATKINS ET AL., RESPONDENTS.**

(No. 3,909.)

(Submitted May 3, 1918. Decided May 28, 1918.)

[173 Pac. 551.]

***Water Rights—Appropriation—Essentials—Doctrine of Relation.*****Water Rights—Appropriation—Essentials.**

1. The essential features of an appropriation of water made prior to Laws of 1885, page 130, were a completed ditch and the application of water to a beneficial use.

**Same—Doctrine of Relation.**

2. Where two rival claimants sought to secure appropriations from the same stream at the same time, prior to Laws of 1885, page 130, each one prosecuting work upon his ditch with reasonable diligence to completion and applying water to a beneficial use, the one who commenced his ditch first secured priority by virtue of the doctrine of relation, his appropriation relating back to the date he commenced work on the ditch.

[As to what constitutes appropriation of water, see note in 60 Am. St. Rep. 799.]

***Appeal from District Court, Madison County; J. B. Poin-dexter, Judge.***

ACTION by Lucy K. Maynard against George S. Watkins and others. From the decree, plaintiff appeals. Modified and affirmed.

*Mr. Geo. Y. Patten*, for Appellant, submitted a brief, and argued the cause orally.

*Mr. M. S. Duncan*, for Respondent Geo. S. Watkins, submitted a brief, and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

By a decree of the district court of Madison county the relative rights of these parties to the use of the waters of Jordan Creek and its tributaries for irrigation purposes were fixed and

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Generally on right of prior appropriators of water, under special statute or custom, see comprehensive note in 30 L. R. A. 668.



determined. Twelve distinct appropriations were recognized and established, but of these only two are called in controversy by these appeals. The court found that on May 1, 1884, plaintiff appropriated 100 inches, and defendant Watkins 60 inches, from Jordan Creek proper. Plaintiff has appealed, and her particular grievance is that the court did not give priority to her appropriation.

In so far as it affects the question now in issue, the evidence is not in conflict at all. During the month of June of each year there is abundance of water in the Jordan Creek system to supply the needs of all the parties, but by July 1 the waters begin to diminish in quantity, and from July 15 there is not to exceed 200 inches in Jordan Creek at plaintiff's ranch; so that, after satisfying her 1868 appropriation of 130 inches, the excess is not sufficient to supply these two appropriations of 1884, and under the decree as it now stands plaintiff will be required to divide the excess with defendant Watkins.

The evidence discloses without controversy that plaintiff's ditch was constructed in the fall of 1883, and water was applied to a beneficial use through it in the spring of 1884. The ditch of defendant Watkins was constructed in the spring of 1884, and used that season, if we give full credit to certain inferences fairly deducible from the evidence. The trial court failed to find the elemental facts from which a conclusion could be drawn that an appropriation was made, but declared the conclusion as a fact that plaintiff "did divert and appropriate of the waters of Jordan Creek the following," *etc.* It is perfectly apparent that the attention of the court was not directed to the law which governs these two appropriations.

Our first statute prescribing the method of making an ap-  
[1] propriation was not enacted until March 12, 1885 (Laws 1885, p. 130). Prior to that date all appropriations were made pursuant to the rules and customs of the early settlers of California, which had been adopted in Montana territory and given the force of law, by recognition of the legislature (Bannack Statutes, Laws 1869-70, p. 57) and the courts. This legislative

and judicial history was reviewed at length in *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575, and need not be repeated here. Since both of these appropriations were made prior to March 12, 1885, and are therefore governed by the rules and customs rather than by statute, our inquiry is limited. What were those rules and what legal conclusions follow as of course from the undisputed evidence before us?

1. The essential elements of an appropriation were a completed ditch and the application of water through it to a beneficial use. (*Murray v. Tingley*, 20 Mont. 260, 50 Pac. 723.)

2. As between two rival claimants seeking to secure appropriations from the same stream at the same time, and each one prosecuting work upon his ditch with reasonable diligence to completion and applying the water to a beneficial use, the one who commenced his ditch first secured the priority by virtue of the doctrine of relation. (*Woolman v. Garringer*, 1 Mont. 535; *Murray v. Tingley*, above; *Wright v. Cruse*, 37 Mont. 177, 95 Pac. 370.) In other words, his appropriation related back to the date he commenced work upon his ditch. The trial court failed to apply these rules, and fell into error. This particular doctrine of relation was superseded by the statutory rule, but the statute has no application here.

Under the undisputed facts, plaintiff's right should have been dated 1883; for, if it were necessary to do so, we would find that work commenced and completed on a ditch in the same fall was prosecuted with reasonable diligence. (*Bailey v. Tintinger*, above.)

A new trial is unnecessary, and the order will stand affirmed.

This cause is remanded to the district court, with directions to modify finding No. 5b by substituting "in the fall of 1883" for "May 1, 1884," and the conclusion of law 1b and the decree to conform with such amended finding, and, as thus modified, the decree will stand affirmed. Appellant will recover her costs.

*Modified and affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**AT THE**  
**JUNE TERM, 1918.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. SYDNEY SANNER,**  
**THE HON. WILLIAM L. HOLLOWAY,** } **Associate Justices.**

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**WALSH, APPELLANT, v. KLEINSCHMIDT ET AL., RESPOND-  
ENTS.**

(No. 3,915.)

(Submitted May 4, 1918. Decided June 6, 1918.)

[173 Pac. 548.]

*Mines and Mining—Failure of Location—Effect—Abandon-  
ment—Quieting Title—Pleadings—Decree.*

**Mining Claims—Failure of Prior Location—Effect on Junior Location.**

1. A prior location of a quartz lode mining claim which thereafter fails does not so absolutely withdraw the land covered by it from entry as to defeat a valid junior location of the same ground.

**Same—Abandonment—What may Constitute.**

2. Where the prior locators of a mining claim agreed with a junior locator that the latter might make entry of the same ground on condition that they should have a one-fourth interest in the new location as well as a right of tunnel site thereon, the effect of such agreement was the abandonment by them of their claim or the yielding of precedence to the junior locator.

[As to abandonment and forfeiture of mining claims, see note in 87 Am. St. Rep. 403.]

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On the question of respective rights of one who locates mining ground before and one who relocates it after, the abandonment or forfeiture of a senior location, see note in 16 L. E. A. (n. s.) 162, 168.

Same—Quieting Title—Pleadings—When Deemed Amended.

3. In a suit to quiet title to a mining claim in the trial of which evidence was presented touching a matter not pleaded and which was permitted to go to submission as though a well-defined issue had been made as to it, the pleadings will on appeal be considered as amended to conform to the proof and the findings made thereon accepted as though stating the established facts.

*Appeal from District Court, Broadwater County; John A. Matthews, Judge.*

Suit by William Walsh against Harry G. Kleinschmidt and others to quiet title to a mining claim. From the judgment for defendants, and from an order denying a new trial, plaintiff appeals. Remanded, with directions to modify.

*Mr. James A. Walsh*, for Appellant, submitted a brief, and argued the cause orally.

*Mr. Wellington D. Rankin*, for Respondents, submitted a brief; *Mr. R. L. Dick*, of Counsel, argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

Suit by William Walsh to quiet title to the Peosta quartz lode, situate in Broadwater County, Montana. He claims exclusive ownership based upon discovery and location made July 10, 1914, followed by an appropriate marking of the boundaries and a due filing of the requisite certificate. The answer of the defendants asserts prior valid locations of the same ground under the title of Sidewiper by Harry Kleinschmidt, Albert R. Kleinschmidt and the plaintiff on June 6 and July 2; the interests of the said Kleinschmidts being thereafter and before the commencement of this action transferred to the defendant Ellen Kleinschmidt. The reply admits an attempted location of said ground as the Sidewiper on June 4, 1914, but alleges failure to mark the boundaries or make the recordation required by law; it also denies that the second Sidewiper location was made until August 2, 1914, or that it was followed by the requisite excavation or by the necessary filing. The findings of the jury material to this appeal were: (1) That the boundaries of the

original Sidewiper located June 4, 1914, were marked within thirty days thereafter; (2) that the second notice of location of the Sidewiper was posted on July 2, 1914; (4) that plaintiff consented to the second location of the Sidewiper; (7) that the Kleinschmidts did not on July 8 tell plaintiff they had abandoned the Sidewiper claim and would have nothing to do with it; (8) that the Kleinschmidts consented to plaintiff's location of the Peosta for himself; (9) that such consent was upon the condition that they should have a one-fourth interest in the claim and a right of tunnel site. The court adopted these findings, and further found that Harry and Albert R. Kleinschmidt had assigned all their right, title and interest to Ellen Kleinschmidt. From these findings it was deduced as conclusions of law that by the first location of the Sidewiper on June 4 the land was withdrawn from entry, and the location of the Peosta was void "even though the locators of the Sidewiper did not complete their work in discovery shaft within the sixty days." By the decree it was adjudged that the plaintiff "has no right, title, or interest in and to the premises \* \* \* under and by virtue of the attempted location of the Peosta." From this judgment, as also from an order denying him a new trial, the plaintiff has appealed.

If we accept as controlling the theory assigned in the conclusions of law, it is perfectly clear that the judgment cannot be affirmed; for it is certainly not correct to say that a prior [1] location which subsequently fails so absolutely withdraws the land from entry as to defeat a junior location of the same ground otherwise valid; quite the contrary was the holding of this court in *Helena Gold & Iron Co. v. Baggeley*, 34 Mont. 464, 87 Pac. 455. Reverting, however, to the facts found in order that we may either uphold the judgment or otherwise finally determine the case—and we say without further elaboration that these findings are supported by sufficient evidence—we are [2] met by this situation: The Peosta was located after the second Sidewiper location, but by consent of the Kleinschmidts on certain conditions. This was tantamount to an agreement by

the Kleinschmidts to abandon the claim or yield precedence to the appellant; hence it cannot be said that the Peosta was void because of conflict with the second Sidewiper location, assuming the latter to have been followed by proper recordation. But such abandonment or yielding was upon condition, accepted by the appellant, to-wit, that he should charge the Peosta with a one-fourth interest and a tunnel site in favor of the Kleinschmidts, and the claim stands charged accordingly.

Counsel say that this is beside the present case and is a matter cognizable only in another action. We think otherwise. The controversy is in equity; all of it is before the court, and even though this feature was not elaborated in the pleadings, it was shadowed forth therein, was injected into the case at the outset by the appellant himself, evidence of it was presented, and the matter was permitted to go to a submission as though it were a defined issue in the case. The pleadings will therefore be considered as amended to conform to this proof; and the findings will be accepted as stating the established facts. Under these facts the decree should have been to recognize the Peosta as a valid location, but to decree that Ellen Kleinschmidt, as assignee of Harry and Albert R. Kleinschmidt, has an interest therein, to-wit, a one-fourth interest and the right of tunnel site.

The cause is therefore remanded, with directions to modify the decree accordingly. Each side will pay its own costs of appeal.

*Modified.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

## WRIGHT, APPELLANT, v. FLYNN ET AL., RESPONDENTS.

(No. 4,216.)

(Submitted May 31, 1918. Decided June 8, 1918.)

[173 Pac. 421.]

*Special Elections — County High Schools — Failure to Publish Notice—Effect.*

1. Where the electors had actual notice of and participated generally in a special election held to determine the advisability of issuing bonds for high school purposes, failure of the county clerk to publish in a newspaper the notice required by section 531, Revised Codes, did not avoid the election.

[As to the necessity for notice or proclamation of election, see note in 120 Am. St. Rep. 794.]

*Appeal from District Court, Missoula County; Theo. Lentz, Judge.*

SURR by Della T. Wright against Jonn J. Flynn and others, county commissioners and clerk and recorder of Missoula county. Judgment dismissing the complaint, and plaintiff appeals. Affirmed.

Cause submitted on briefs of Counsel.

*Mr. William Wayne* and *Mr. Frank A. Roberts*, for Appellant.

*Mr. S. C. Ford*, Attorney General, *Mr. R. L. Mitchell*, Assistant Attorney General, *Mr. Fred R. Angevine* and *Mr. Dwight N. Mason*, for Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At a special election held in 1916, a majority of the electors voting authorized the county commissioners to issue bonds in the sum of \$75,000 to build and equip an addition to the county high school building. Some time after the election this suit by a taxpayer was instituted to enjoin the issue and sale of the

bonds, and this appeal is from a judgment dismissing the complaint.

The cause was tried upon what amounts to an agreed statement of facts. Though this bond election was held at the same time as the general election, November 7, 1916, separate ballots were provided and used in voting upon this issue. The county clerk did not publish a notice of this special election in any newspaper as required by section 531, Revised Codes, but did cause a notice thereof to be posted in each of three of the most public places in each precinct—one at the voting place—and by reason thereof and the public discussion of the matter the electors throughout the county had actual knowledge that the question would be voted on, long prior to the election. Seven thousand three hundred and sixty was the highest number of votes cast for any candidate or upon any question at the election. Seven thousand one hundred eighty-nine electors voted upon this bond issue, and the majority in favor of the bonds was 717.

For the purposes of this appeal we assume that the repeal of section 1318, Political Code of 1895, did not affect the duties imposed upon the county clerk by reference to that section in section 531 above. (*Ventura County v. Clay*, 112 Cal. 65, 44 Pac. 488.) Did the failure of the clerk to publish the notice avoid the election notwithstanding the electors had actual notice and participated generally in the election? The inquiry is answered in the negative and the question set at rest in this state by the decision in *State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932.

The judgment is affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.



## IN RE WILLIAMS' ESTATE.

(Nos. 4,108, 4,110.)

(Submitted May 6, 1918. Decided June 10, 1918.)

[173 Pac. 790.]

*Estates of Deceased Persons — Special Administrators—Powers  
—Interest—Costs—Attorney's Fees.***Special Administrators—Who Entitled to Appointment.**

1. Where the necessity for a special administrator arises in the administration of an estate, a person named executor in the will is, under section 7472, Revised Codes, entitled to be appointed as such.

[As to who may be an executor or administrator, see note in 54 Am. Dec. 518.]

**Same—Powers and Duties.**

2. The office of special administrator is statutory, his powers and duties are limited to those enumerated in the statute (secs. 7470-7476, Rev. Codes), and his authority ceases automatically upon the appointment and qualification of the executor or general administrator.

**Same—District Court—Jurisdiction.**

3. The district court is without power to require a special administrator to go beyond the fair import of the terms of the statute governing his actions.

**Same—Loaning Funds—Interest.**

4. A special administrator has no power to loan the funds of the estate in his charge, and therefore cannot be held to pay interest for failing to loan them.

**Same—Who Entitled to Interest on Funds.**

5. If a special administrator receives profits from funds of the estate in his keeping, such profits belong to the heirs and must be included in his final account.

**Same—Presumptions—Abuse of Power—Burden of Proof.**

6. The presumption is that the official duties of a special administrator were regularly performed and that he did not abuse his power; and the burden of showing that profits accrued to him from use of the funds of the estate is upon the objectors who charged wrongful conduct.

**Same—Interest on Estate Funds—Unlawful Use.**

7. Since a special administrator cannot lawfully invest, loan or use funds which come into his hands by virtue of his office, the only theory upon which he can be held to account for profits accruing upon them is that he made an unlawful use of them.

**Banks and Banking—Deposits—Ownership.**

8. When money is deposited in a bank it becomes its property, the bank assuming the relationship of debtor toward the depositor; hence use of it by the bank is a use of its own and not the depositor's funds.

**Special Administrators—Failure to Loan Funds—Interest.**

9. Where a special administrator permitted estate funds to remain in an open, checking account for about nine years in a bank, all but fourteen per cent of the capital stock of which was owned by him,

he was nevertheless not chargeable with interest upon the theory that by mingling the funds with those of the bank and using them he unlawfully profited by their use.

**Same—Costs—When Disallowance Proper.**

10. Where court costs incurred by a special administrator were impossible of separation from costs personal to him as residuary legatee, refusal of any credit on account of such items was proper.

**Same—Attorneys' Fees—When Allowable.**

11. Attorneys' fees paid by a duly appointed special administrator in resisting the efforts of an illegally appointed public administrator to obtain possession of the property of the estate were a proper cost charge against it.

**Same—Wrongful Withholding of Property—Payment of Taxes.**

12. Credit for taxes paid by a special administrator upon property wrongfully withheld by him when he relinquished his office was properly disallowed in the absence of a showing that no prejudice to the estate resulted by reason of his omission.

**Same—Care of Property—Expense Chargeable to Estate.**

13. Where a special administrator permitted the person, placed in charge of furniture belonging to the estate, to use it in consideration of his services as caretaker, the damage resulting from such use was not chargeable to the administrator, it amounting to much less than the compensation a paid caretaker could have been secured for.

**Same—Costs—Liability—Rule.**

14. Where it is sought to have costs taxed against an administrator personally, the controlling inquiry is whether he acted in good faith; if so, justice requires that they be paid out of the funds of the estate.

**Same—Costs—Liability.**

15. *Held*, under the above rule, that costs of defeating the unjust claim against a special administrator that he pay interest on estate funds while in his hands were improperly charged against him.

*Consolidated appeals from District Court, Silver Bow County, in the Second Judicial District; R. Lee Word, a Judge of the First District, presiding.*

PROCEEDINGS in the estate of Rachael E. Williams, deceased, wherein Andrew J. Davis, special administrator, presented his final account, to which Sibyl Scott, as administratrix of Rachael E. Williams and Dorothy Alice Williams, a minor, by her guardian, Sibyl Scott, objected. From an order sustaining some objections and overruling others, the objectors appeal, and from a portion of the order the special administrator appeals. Remanded, with directions.

*Mr. J. E. Healy*, for Appellants, submitted a brief, as well as one in reply to that of Respondent, and argued the cause orally.

The burden was upon the special administrator to show that he did not profit by his trusteeship, the record shows that he did profit. (Wigmore on Evidence, secs. 2486, 2487; Rev. Codes, sec. 8028 (subds. 6, 7). He created the delay, in his own interest, and to his own profit and advantage, and should be charged with compound interest. (*Estate of McPhee*, 156 Cal. 335, Ann. Cas. 1913E, 902, and cases cited, 104 Pac. 455; *Estate of Lux* (Cal.), 35 Pac. 347; *Estate of Pease*, 149 Cal. 167, 85 Pac. 151; *Estate of Ricker*, 14 Mont. 143, 29 L. R. A. 622, and notes, 35 Pac. 960; *Estate of Allard*, 49 Mont. 219, 141 Pac. 661; *Estate of Philips*, 29 Misc. Rep. 263, 61 N. Y. Supp. 241.)

Messrs. Maury & Wheeler and Mr. J. A. Poore, for Respondent, submitted a brief; Mr. H. L. Maury and Mr. Poore argued the cause orally.

Where the right to a controverted administration is successfully established, the administrator is entitled to credit for the expenses of the controversy. (*Ex parte Young*, 8 Gill (Md.), 285; *In re Whetton's Estate*, 98 Cal. 203, 32 Pac. 970; *In re Davis' Estate*, 35 Mont. 273, 88 Pac. 957.) A special administrator has no power to invest as a general administrator may under orders of court. (*In re Higgins' Estate*, 15 Mont. 474, 28 L. R. A. 116, 39 Pac. 506; *State ex rel. Bartlett v. Second Judicial District Court*, 18 Mont. 481, 46 Pac. 259; *People v. Salomon*, 184 Ill. 490, 56 N. E. 815; *Baskin v. Baskin*, 4 Lans. (N. Y.) 90; 18 Cyc. 1328.)

Where the statute simply authorizes him to "collect and preserve" the estate, a special administrator has no authority or power to invest the funds of the estate; he can only collect and preserve the estate to be delivered to the general administrator as soon as one is appointed. (*People v. Salomon*, 184 Ill. 490, 56 N. E. 815; *Baskin v. Baskin*, 4 Lans. (N. Y.) 90.) It was held in the case of *In re Schofield's Estate*, 99 Ill. 513, that an administrator is not chargeable with interest merely because he has deposited the money of the estate with his own money,

so long as it remains subject to his command and the order of the court.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On May 26, 1916, Andrew J. Davis, special administrator of the estate of Rachael E. Williams, deceased, presented in court his final account. The general administrator and the guardian of Dorothy Alice Williams interposed certain objections, and after a hearing the court entered its order of May 29, 1917, as amended by an order of June 16, 1917, sustaining some of the objections and overruling others. The objectors have appealed from the order as amended in so far as it fails to charge the special administrator with interest on funds of the estate in his possession, and the special administrator has likewise appealed from it in so far as he deems himself aggrieved. The appeals are consolidated and will be considered in their order.

We enter upon our consideration of these appeals indulging [1] the presumption that the district court was fully justified in appointing the special administrator and that his possession of the property of the estate until the general administrator qualified was lawful. The will was valid upon its face and required extrinsic evidence to demonstrate its invalidity. Davis was an executor named in the will, and, assuming the existence of the necessity for a special administrator, he was entitled to be appointed. (Rev. Codes, sec. 7472.)

1. *The objectors' appeal:* Apparently the objectors seek to charge the special administrator with interest upon either of two theories: (1) Because he could have loaned the funds of the estate and did not, and was therefore guilty of negligence in its management and should be held to pay interest at the legal rate; (2) because he did employ the money of the estate in such manner that it realized a profit to him personally and he should be held to account for the profit or be required to pay interest in lieu thereof.

(1) It is idle to cite sections of the Code or decided cases which have to do with the duties and liabilities of a guardian, an executor, or a general administrator, for they have no application to a special administrator, whose duties, powers and responsibilities are defined by sections 7470-7476, Revised Codes,

[2] His office is one specially created by statute with limited tenure and limited powers. To determine whether a particular duty is imposed upon him, he has but to consult these seven sections of the Code, and, if the duty is imposed, it is there disclosed. If the statute is silent, it is so because the legislature has withheld the duty. These sections have been construed to limit the functions of a special administrator to the exercise of such powers only as are "necessary to collect and preserve the estate for the executor or administrator to be regularly appointed." (*State ex rel. Bartlett v. District Court*, 18 Mont. 481, 46 Pac. 261; *Ford's Estate*, 29 Mont. 283, 74 Pac. 736.) The reason for the rule must be apparent to anyone. The special administrator holds temporarily and may be called upon to relinquish his control any day. His authority ceases automatically upon the appointment and qualification of the executor or general administrator. (Sec. 7475, Rev. Codes.) To such an extent are the provisions of sections 7470-7476 exclusive, that [3] the court whose officer the special administrator is cannot require him to go beyond the fair import of their terms, and any acts done by him beyond the scope of the authority conferred are void. (*State ex rel. Bartlett v. District Court*, above.)

It is worthy of note, in passing, that the duty to loan the funds of an estate is not imposed upon an executor or general administrator as such. (*Brenham v. Story*, 39 Cal. 179.) The duty might be required by statute, but in this state it has not been done. (*Davis' Estate*, 35 Mont. 273, 88 Pac. 957.) Such an officer may, however, be directed, by order of court made after notice, to loan the funds for a limited period and upon certain specified securities only. (Sec. 7652, Rev. Codes.)

[4] But the *authority* to loan the funds of an estate is not

conferred upon a special administrator, evidently because of the fact that his tenure is uncertain and he may be called upon to turn over the property at any time. It was impossible for the special administrator to anticipate that he would have the control of the funds of this estate for any considerable period; but, even if he could have done so, the statute which measures his duties and responsibilities does not permit him to loan the funds, and this of itself is sufficient reason why he cannot be held to pay interest for his failure to do that which he had no authority to do. (*People ex rel. Bulkley v. Salomon*, 184 Ill. 490, 56 N. E. 815.)

(2) The statute which enumerates the powers of a special [5] administrator does not authorize him to traffic in the funds, but by implication prohibits him from doing so. Furthermore, the title to this property passed to the heirs immediately upon the death of Rachael E. Williams, subject only to the control of the court for the purposes of administration (sec. 4819, Rev. Codes), and from these premises it follows as of course that, if the special administrator received any profits from funds in his hands by virtue of his office, they likewise belong to the heirs as constituting a part of the estate and must be included in his final account.

The only question then is: Did the special administrator receive any profits from funds which constituted a part of this [6] estate? The presumption is that his official duties were regularly performed and that he did not abuse his power, and the burden of showing that profits accrued to him is upon the objectors who make the charge of wrongful conduct. (*In re Dolenty's Estate*, 53 Mont. 33, 161 Pac. 524.)

The facts disclosed are that, when Rachael E. Williams died [7-9] in 1907, she had on deposit with the First National Bank of Butte a considerable amount of money in an open, checking account upon which the bank did not pay any interest. When Mr. Davis qualified as special administrator and took charge of the property, no change whatever was made in the character of this account, except to have the books of the bank show that it

was carried in the name "Rachael E. Williams' Estate" and subject to check by Mr. Davis as special administrator. Subsequently deposits were made to the credit of the account and certain expenses paid from it. Because of the will contest and appeals incident thereto (*Williams' Estate*, 50 Mont. 142, 145 Pac. 957; *Id.*, 52 Mont. 192, Ann. Cas. 1917E, 126, 156 Pac. 1087; *Id.*, 52 Mont. 366, 157 Pac. 963), the special administration was permitted to drag out over a period of nine years, during all of which time the money in the estate continued on deposit in the bank under the same arrangement as a checking account upon which no interest was paid. During all this time Mr. Davis was the president and guiding genius of the bank and the owner of eighty-six per cent of its capital stock. The bank is one of the largest institutions of its kind in the state and one of the most successful, paying handsome dividends upon the stock, earned principally from interest upon loans.

It is not contended that a *solvent* bank is not a proper depository for the safekeeping of estate funds, or that Davis received directly anything for the use of these funds by the bank; but it is insisted that, as these funds were mingled with other funds of the bank, the aggregate of which produced the profits made by the bank, Davis did profit by their use by reason of his ownership of bank stock. In other words, a certain proportion of the dividends paid to Davis represents earnings of the funds of this estate. As already observed, the duty imposed by statute was to exercise ordinary care to keep these funds safely and in condition to be turned over to the general administrator at any time. So long as the funds were so kept, the place of their keeping is of no consequence. They might have been locked in a private safe, in a safe deposit vault, or deposited in a solvent bank subject to payment on demand without interest, and in either event payment over to the general administrator of the funds so received, less legitimate expenses incurred, would have operated to exonerate the special administrator. Does the fact that Davis owned stock in the bank which was the depository alter the situation? If he is

liable because he owns stock in the bank, then it is immaterial whether he owns eighty-six per cent of the stock or one per cent. If he is liable because he controls the institution, then it is immaterial whether he owns eighty-six per cent or a bare majority of the stock.

The only theory upon which a special administrator can be held for profits accruing upon estate funds in his hands by virtue of his office is that he has made an unlawful use of the funds, for, as we have already pointed out, he cannot lawfully invest them, loan them, or use them. In what respect did Davis violate the law in keeping these funds in the First National Bank? The funds were kept safely and subject to payment on demand at any time. They were kept in the depository selected by the deceased in her lifetime for her own funds, and in an institution over which the special administrator had supervision, and of the solvency of which he had personal knowledge. The fact that Davis owned stock in the bank does not convert into an unlawful act that which otherwise would have been lawful. When these funds were deposited, the money became the property of the bank and the bank became debtor to the estate, or, more strictly speaking, to the special administrator. (*Stadler v. First Nat. Bank*, 22 Mont. 190, 74 Am. St. Rep. 582, 56 Pac. 111; *Murphy v. Nett*, 51 Mont. 82, L. R. A. 1915E, 797, 149 Pac. 713.) When the bank used these funds to make profit, it was using its own funds, not the funds of the estate, and dividends paid to Davis were profits earned upon the bank's own money, not upon money owned by this estate.

If it can be said that the corporate entity, "First National Bank of Butte," is a mere phantom, or that the name is but an *alias* under which Andrew J. Davis conducts his private business, then, upon the authority of *Barnes v. Smith*, 48 Mont. 309, 137 Pac. 541, and *Hanson Sheep Co. v. F. & T. State Bank*, 53 Mont. 324, 163 Pac. 1151, we would say that a deposit with the bank was a deposit with himself, and use of this money by the bank was use of it by Davis and he must account for any profits accruing from such unauthorized use. This institution



was organized under and conducts its business by virtue of the national banking laws of the United States. It must have at least five directors (sec. 5145, Rev. Stats. [6 Fed. Stats. Ann., 2d ed., p. 703; U. S. Comp. Stats. 1901, p. 3463; U. S. Comp. Stats. 1916, sec. 9683]), each of whom must be a *bona fide* owner of at least ten shares of stock (sec. 5146 [6 Fed. Stats. Ann., 2d ed., p. 704; U. S. Comp. Stats. 1916, sec. 9684]) of the par value of \$100 each (sec. 5139 [6 Fed. Stats. Ann., 2d ed., p. 688; U. S. Comp. Stats. 1916, sec. 9676]). It is subject to visitation by the proper officers of the government, is a unit of the federal reserve system, and fourteen per cent of its capital stock is owned by persons other than Mr. Davis. Since the government apparently does not place any restriction upon the amount of capital stock which one individual may own, except the restriction implied in the sections cited above, we do not think it can be contended that the charter of this bank is subject to forfeiture because one man owns sufficient stock to control the election of the directors and the policy of the bank, or that the bank is a mere device under cover of which Davis conducts his own private business.

The order of the trial court refusing to charge the special administrator with interest is clearly correct and must be affirmed.

2. *The special administrator's appeal:* Complaint is made that the court erroneously refused to allow to the special administrator as credits: (a) Certain costs and expenses incurred in the Henry Williams estate; (b) an attorney fee; (c) certain taxes paid; and likewise erroneously charged him with (d) an item of \$3,950.23, (e) an item of \$500, and (f) the entire costs of this hearing.

(a) It appears from the record that the court costs were [10] incurred by Davis acting as special administrator and in his private capacity as residuary legatee under the spurious will, and though benefit may have accrued to the estate by reason of the litigation in which these expenses were incurred, so long as it was impossible to separate the costs personal to Davis

from those incurred on behalf of the estate, the court was justified in refusing any credit on account of these items.

(b) Rachael E. Williams died about March 3, 1907. On [11] March 15 a paper purporting to be her last will was offered for probate in the district court of Silver Bow county. Certain objections were interposed, and, pending the hearing, Davis was appointed special administrator of the estate, qualified and took possession of the assets. In the meantime, on March 9, A. Short, public administrator of Deer Lodge County, secured from the district court of that county his appointment as administrator of this estate, and thereafter, in December, 1909, petitioned the court of Silver Bow county to remove Davis as special administrator and secured a citation to Davis to show cause why he should not be required to deliver possession of the property of the estate to the Deer Lodge administrator. Davis employed Geo. F. Shelton, an attorney, who prepared written opposition to the motion and a return to the citation, and conducted the proceedings in court to a determination successful to the special administrator. For the services so performed, Davis paid Shelton \$750, which is admitted to be reasonable compensation for the services rendered, and in his final account the special administrator, after setting forth the facts, asked that he be given credit for the amount as a legal charge against the funds of the estate. Upon objection, the district court refused to allow the credit. Upon what theory this claim was disallowed we are unable to understand. As special administrator it was the duty of Davis to retain possession of the property belonging to this estate, until an executor or general administrator was legally appointed and duly qualified. The district court of Deer Lodge county had no jurisdiction over the estate—the deceased being a resident of Silver Bow county at the time of her death—and the order appointing Short was *coram non judice*. (Sec. 7383, Rev. Codes.) Davis could not lawfully surrender possession of the property to Short, but he was required by virtue of his office to resist the proceedings and was authorized by section 7474 to do so.

The mental attitude of Davis toward the property in the estate is of no consequence. He discharged a duty imposed upon him by law and is entitled to credit for the reasonable expense incident thereto. In the brief of counsel for objectors it is urged that Davis' contest of the Short proceedings was waged by him as a residuary legatee under the spurious will, but the record does not sustain this contention and could not. The return to the citation discloses that Davis appeared as special administrator and not otherwise. Indeed, he could not have defended upon any other ground. As residuary legatee he had no right to the possession of the property and no preference right to appointment as special administrator. It was only in his capacity as special administrator that he could be heard to insist upon his right of possession and his duty to retain such possession.

(c and d) Three thousand nine hundred and fifty dollars and twenty-three cents came into the possession of the special administrator by virtue of ancillary administration had in England. No third party disputed the title of the estate to this money, and it was not a part of Mr. Davis' duty to raise any question so long as he does not claim it himself. *Prima facie* the money belonged to the estate and the court properly charged it to the special administrator.

In June, 1916, the special administrator delivered to the general administrator the property of the estate which he admitted belonged to it, but withheld this \$3,950.23 pending a decision upon this hearing. While thus retained, this sum was subject to taxation for the year 1917 and \$169.84 paid out of it for such taxes. The special administrator now insists that he should be credited with the amount of the taxes and required to account for only \$3,780.39, the residue. The contention is based upon the assumption that the property was subject to taxation and that the estate is not prejudiced by the fact that the taxes were paid, even though irregularly, by someone other than the general administrator. As an abstract proposition, this conclusion might follow if the premises were sound; but if

this fund had been delivered in June, 1916, as it should have been, the general administrator might have secured authority under section 7652, above, to invest it in government bonds exempt from taxation or in other interest-bearing securities which would have produced an income sufficient to pay the taxes, at least. It was withheld wrongfully, and the burden of showing that no prejudice resulted to the estate by reason thereof was upon the special administrator, and in this he failed.

(e) Among the effects of Rachael E. Williams at the time of [13] her death were certain articles of household furniture of the value of \$1,500. The special administrator took possession of this property and put a caretaker in charge of it permitting him to use the furniture as consideration for his services in looking after it. The court found that by reason of such use the value of the furniture had depreciated to the extent of \$500 and charged the special administrator with that amount. As heretofore pointed out, it was the duty of the special administrator to preserve this furniture for the general administrator. The manner in which it should be preserved is left to his discretion, and, if the means employed were effective and the expense to the estate not excessive, he is entitled to credit for its care. It was of no consequence to the estate whether \$500 in cash was paid for the care of this property, or an equal amount expended upon it through its use by the caretaker. The result would be the same. The special administrator offered evidence to show that by the means which he employed the estate was depleted \$400 less than it would have been had he crated the furniture and stored it as he might have done. We cannot understand the theory upon which an expenditure of approximately \$900 would be approved and an expenditure of \$500 to accomplish the same end, rejected. In charging the special administrator with this item, the court erred.

(f) The court taxed all the costs of this hearing against the [14] special administrator personally. Speaking generally, costs in probate proceedings are governed by section 7718, Revised Codes, which provides that the costs may be taxed against

any party to the proceeding or ordered paid from the funds of the estate as justice may require. New York and California each has a similar statute, and it has been held—and we think rightly—that the controlling consideration in every instance is: Did the party against whom it is sought to have the costs taxed act in good faith with respect to the particular matter which gave rise to the costs? (*Noyes v. Aid Society*, 70 N. Y. 484; *Henry v. Superior Court*, 93 Cal. 569, 29 Pac. 230.)

It is conceded by counsel for objectors that an item of \$30 is erroneously included in the cost bill. It appears that the [15] sum of \$93.20 was paid to witnesses called by the objectors to testify with reference to their claim that the special administrator should be made to pay interest. This contention was determined in his favor, and certainly it cannot be said that he acted in bad faith in refusing to account for interest which he was not required to pay. Justice does not require him to pay the costs of defending against an unjust claim.

The cause is remanded to the district court, with directions to modify the order as amended, by crediting the special administrator with \$750 paid Geo. F. Shelton as an attorney fee in the Short proceedings, by eliminating the item of \$500 for depreciation of furniture, and by deducting \$123.20 from the cost bill, and, when thus modified, the order will stand affirmed, but the special administrator will be entitled to deduct from the funds of the estate now in his possession one-half of his costs of these appeals. Except as herein otherwise directed, each party will pay his own costs of these appeals.

*Modified.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

**EQUITABLE LIFE ASSURANCE CO. ET AL., APPELLANTS,  
v. HART, STATE TREASURER, ET AL., RESPONDENTS.**

(No. 4,176.)

(Submitted May 6, 1918. Decided June 13, 1918.)

[173 Pac. 1062.]

***Taxation—License Fees—Insurance Corporations—Statutes  
and Statutory Construction—Implied Repeal—Defect in  
Title—Classification—Discrimination—Double Taxation—For-  
eign and Domestic Corporations.***

**Taxation—License Fees—Insurance Corporations—Statutes.**

1. *Held*, that, the purpose of Chapter 79, Laws of 1917, being the imposition of a license fee of one per cent upon the net income of every corporation in the state for the privilege of doing business as such, without regard to the character of the business, insurance corporations were intended to be within its purview.

**Statutory Construction—Unexpressed Intention—Effect.**

2. A supposed unexpressed intention of the legislature in enacting a statute cannot override the clear import of the language employed by it.

[As to judicial inquiry into motives prompting enactment of legislative ordinance, see note in *Ann. Cas.* 1912A, 716.]

**Taxation—License Fees—Insurance Corporations—Repeal of Statute.**

3. *Held*, that section 4017, Revised Codes, requiring insurance corporations to pay certain license fees before commencing to do business in this state, was not impliedly repealed, nor by the general repealing clause found in Chapter 79, Laws of 1917, imposing a further license fee of one per cent upon their net income.

**Same—Double Taxation.**

4. The license fee required of insurance corporations by section 4017 and that exacted by Chapter 79, Laws of 1917, *held* not to constitute double taxation, the impositions, though upon the same persons, not being for the same thing.

**Statutes—Repeal by Implication—General and Special Acts.**

5. An Act special in character, followed by one of a general nature, is not to be considered as repealed by implication.

**Same—Defective Title—What is not.**

6. A misplaced quotation mark in the title of an Act in referring to a statute to be repealed is not sufficient to render the Act invalid on the ground of a defective title.

**License Tax—Occupation—Classification.**

7. Occupation may be made ground for license tax classification, whether as to the amount imposed, or as between subjection to or immunity from taxation.

**Same—Insurance Corporations—Discrimination.**

8. Chapter 79, Laws of 1917, *held* not unconstitutional because of alleged discrimination between corporations whose business is and

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On the question of validity of license tax on foreign insurance companies, see note in 24 L. E. A. 299.

those whose business is not wholly within this state, such discrimination being necessary to attain reasonable equality of burdens between the two.

**Foreign Corporations—Advantages Over Domestic Corporations.**

9. Foreign corporations cannot complain that they are not given advantages over those created by authority of this state.

*Appeal from District Court, Lewis and Clark County; B. Lee Word, Judge.*

**ACTION** by the Equitable Life Assurance Society of the United States, a corporation, and others, against H. L. Hart, State Treasurer, and R. G. Poland, State Auditor. Judgment for defendants, and plaintiffs appeal. Affirmed.

*Messrs. Walsh, Nolan & Scallon*, for Appellants, submitted a brief; *Mr. C. B. Nolan* and *Mr. E. C. Day*, of Counsel, argued the cause orally.

While it is true that repeals by implication are not favored, nevertheless where the Acts are irreconcilable and are conflicting and where the later Act revises the whole subject matter covered by former legislation, then a repeal is effected. (*Jobb v. Meagher County*, 20 Mont. 424, 51 Pac. 1034; *State ex rel. Wynne v. Quinn*, 40 Mont. 472, 107 Pac. 506.) Where two statutes are passed by the same legislature, the presumption against repeal is strong; still, where the whole purpose of the prior law is covered by the subsequent Act, the latter will control. (*Proctor v. Cascade County*, 20 Mont. 315, 50 Pac. 1017.) A statute passed subsequent to another Act, which is incompatible with its provisions, repeals by implication the parts of the first Act that are inconsistent with it. (*United States v. 196 Buffalo Robes*, 1 Mont. 489; *State ex rel. Danaher v. Miller*, 52 Mont. 562, 160 Pac. 513.)

Double taxation is, at best, odious. There is no proposition better settled than that double taxation is not favored, and unless it is clearly evident that the double tax is intended, courts will so construe laws that such result will be avoided. (*Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830, 6 Sup. Ct. Rep. 645.) "The presumption of law \* \* \* is against

double taxation, and \* \* \* statutes will be construed to avoid such a result if possible." (Gray's Limitations of Taxing Power, 678; Burroughs on Taxation, 178; *People ex rel. New York etc. Ry. v. Roberts*, 32 N. Y. App. Div. 113; *People v. Home Life Ins. Co.*, 92 N. Y. 328; *Georgia R. & B. Co. v. Wright*, 125 Ga. 589, 54 S. E. 52; *First Nat. Bank v. Douglas County*, 124 Wis. 15, 4 Ann. Cas. 34, 102 N. W. 315; *South-western Telegraph & Telephone Co. v. Meerscheidt* (Tex. Civ.), 65 S. W. 381; *City of Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224, 49 L. R. A. 408, 51 N. E. 907; *Rice County Commrs. v. Citizens' Nat. Bank*, 23 Minn. 280; *Gambill v. Erdrich Bros.*, 143 Ala. 506, 39 South. 297.) And this court in the case of *Anaconda Copper Min. Co. v. Ravalli County*, 52 Mont. 422, 158 Pac. 682, placed the seal of its condemnation upon such a practice, giving expression to the fundamental principle contended for when it said that it was the policy of the law that there should not be double taxation of property.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondents, submitted a brief; *Mr. Woody* argued the cause orally.

The title of the Act in question and its provisions clearly indicate that it was the intention of the legislature to impose a license fee, under the last paragraph of section 1 of Article XII of the Constitution, upon all corporations doing business in the state, and for the purpose of determining the amount of such license fees to be paid by such corporations the legislature divided corporations into two classes, placing in the first class all corporations doing business wholly within this state, and in the second class all corporations doing business partly within and partly without this state. That the legislature has the power to so classify corporations for such purpose there can be no question. (*State ex rel. Sam Toi v. French*, 17 Mont. 54, 30 L. R. A. 415, 41 Pac. 1078; *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, 32 L. R. A. 635, 44 Pac. 516; *Quong*



*Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250; *State v. McKinney*, 29 Mont. 375, 1 Ann. Cas. 579, 74 Pac. 1095.)

A corporation engaged in the insurance business is possessed of and exercises two franchises or privileges. One, the primary franchise of the right to exist as a corporation, and to enjoy continued corporate existence, and, two, the secondary franchise of the right to engage in, transact and carry on a particular business. (Joyce on Franchises, sec. 8.) A tax or fee imposed in the shape of an annual charge or excise upon the right or privilege to exist as a corporation or to exercise continued corporate existence in the state is not a property tax but is a privilege or license tax. (Gray's Limitations of Taxing Power, pp. 40, 41, secs. 53-55; Cooley on Taxation, 2d ed., p. 573; *Northwestern Mut. Life Ins. Co. v. Lewis & Clarke Co.*, 28 Mont. 484, 98 Am. St. Rep. 572, 57 L. R. A. 97.

The precise question here involved, whether the provisions of section 4017, as amended, and the provisions of Chapter 79, Acts 1917, will result in the payment of a double license for the same privilege, has been before the courts in many cases. (See *State v. Berry*, 52 N. J. L. 308, 19 Atl. 665; *Lumberville Delaware Bridge Co. v. State Board of Assessors*, 55 N. J. L. 529, 25 L. R. A. 134, 26 Atl. 711; *Troy Fertilizer v. State*, 134 Ala. 333, 32 South. 617; *Spira v. State*, 146 Ala. 177, 41 South. 465; *Southern Ry. Co. v. Greene*, 160 Ala. 396, 49 South. 404; *Cobb v. Commissioners of Durham Co.*, 122 N. C. 307, 30 S. E. 338; *Kaiser Land & Fruit Co. v. Curry*, 155 Cal. 638, 103 Pac. 341.) The question presented to the supreme court of Oregon, in the case of *State v. Pacific States Tel. & Tel. Co.*, 53 Or. 162, 99 Pac. 427, is almost identical with the one here presented to this court. There the corporation paid the license fee required to be paid by all corporations, and having refused to pay the license of two per cent on its gross receipts, required by a later Act, the state instituted suit to recover the same. The court held that the defendant was required to pay both licenses.

The contention that the construction which the state is contending for is inimical to the fourteenth amendment to the

Constitution of the United States is disposed of by the following decisions: *New York v. Roberts*, 171 U. S. 658, 43 L. Ed. 323, 19 Sup. Ct. Rep. 58; *Home Ins. Co. v. New York*, 134 U. S. 594, 33 L. Ed. 1025, 10 Sup. Ct. Rep. 593; *Horn Silver Min. Co. v. New York*, 143 U. S. 305, 36 L. Ed. 164, 12 Sup. Ct. Rep. 403; *Moline Plow Co. v. Wilkinson*, 105 Mich. 57, 62 N. W. 1119; *Scottish Union Ins. Co. v. Herriott*, 109 Iowa, 606, 77 Am. St. Rep. 548, 80 N. W. 665; *State v. Hammond Pack. Co.*, 110 La. 180, 98 Am. St. Rep. 459, 34 South. 368; *Southern Ry. Co. v. Greene*, 160 Ala. 396, 49 South. 404; *Clarksdale Ins. Agency v. Cole*, 87 Miss. 637, 40 South. 228; *People v. Equitable Trust Co.*, 96 N. Y. 387; *Pembina Co. v. Pennsylvania*, 125 U. S. 181, 31 L. Ed. 650, 8 Sup. Ct. Rep. 737; *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 68 N. W. 958.

MR. JUSTICE SANNER delivered the opinion of the court.

The appellants, foreign insurance corporations doing business in this and other states of the Union, have been held by the judgment below for payments in the form of license fees under Code, section 4017 (as amended by Chapter 63, Laws of 1915) and also under Chapter 79, Laws of 1917. This appeal is from that judgment, the appellants contending (A) that Chapter 79, Laws of 1917, does not apply to them or to insurance corporations in their situation; (B) that if it does apply, it repeals section 4017, so that they are not liable to payment under both laws; and (C) that if it does apply and does not repeal section 4017, then it is unconstitutional and void.

(A) Chapter 79, Laws of 1917, provides:

"Section 1. Every corporation except as hereinafter provided \* \* \* and engaged in business in the state of Montana, \* \* \* shall annually pay for the exclusive use and benefit of the state of Montana a license fee for carrying on its business in the state of Montana of one per centum upon the total net income received by such corporation in the preceding fiscal year from all sources within the state of Montana, \* \* \* provided, however, that in the case of a corporation engaged

in interstate commerce the license fee shall be based upon the net earnings of said corporation derived from its intrastate business in the state of Montana only. There shall not be taxed under this title any income received by any [here follow sixteen exceptions, fifteen embracing corporations of a federal or of a mutual, eleemosynary or other nonprofit earning character, and the sixteenth as follows] corporation engaged in the business of brewing or manufacturing malt liquors or distilling, manufacturing or rectifying spirituous liquors which pay a license under the provisions of sections 2770 and 2771 of the Revised Codes. \* \* \*

“Sec. 2. In the case of a corporation engaged in business wholly within the state of Montana, such net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources—First, all the ordinary and necessary expenses; \* \* \* second, all losses actually sustained and charged off within the year and not compensated by insurance or otherwise; \* \* \* third, the amount of interest paid within the year on its indebtedness; \* \* \* fourth, taxes and license fees paid within the year imposed by authority of the United States or its territories or possessions, or any foreign country, or under the authority of this state or any county, school district or municipality or other taxing subdivision of this state, not including those assessed against local benefits; fifth, \* \* \* an arbitrary deduction of \* \* \* \$10,000.

“Sec. 3. In the case of a corporation engaged partly in business within the state of Montana and partly within any other state or territory of the United States or any foreign country, the net income shall be ascertained by deducting from the gross amount of its income received within the year from all sources within the state of Montana, other than the income derived from interstate commerce: First, all the ordinary and necessary expenses; \* \* \* second, all losses actually sustained within the year; \* \* \* third, the amount of interest paid within the year on its indebtedness; \* \* \* fourth, taxes paid

within the year imposed by the state of Montana or by any county, school district or municipality or other taxing subdivision of the state of Montana, not including those assessed against local benefits; fifth, \* \* \* an \* \* \* arbitrary deduction of \* \* \* \$10,000. \* \* \*

"Sec. 10. That section 2773 of the Revised Codes \* \* \* and sections 2774 and 2777 of the Revised Codes \* \* \* and all Acts and parts of Acts in conflict with this Act are hereby repealed."

It will be observed that nothing in the language or subject [1] matter of this statute justifies the view that insurance corporations are to be excluded from its operation, and that they are not to be seems clearer still from what counsel tell us in the history of the Act. They say: "When the legislative assembly met in January, 1917, the executive department found itself confronted, by reason of the growth of the state, with a necessity for a large expenditure which could not be met by taxation in the method prescribed by the Constitution and statutes relating to taxation of property under the taxing power of the state. The subject was referred to by the governor in his message to the legislature. The legislature, after several plans had been introduced in which it was sought to impose the additional burden of taxation upon certain selected corporations or lines of business, appointed a joint committee composed of three from the senate and five from the house, to devise ways and means for meeting the emergency. This committee selected two attorneys to advise it as to the power of the legislature, viz., Mr. H. G. McIntire by the senate, and Mr. E. C. Day, one of the attorneys on this brief, for the house. Sessions of the committee were held and the subject discussed in all its phases, when the attorneys recommended to the joint committee the adoption of the principle of a license or excise tax as that power of the state and of the United States had been outlined by the supreme court of the United States in the case of *Flint v. Stone Tracy Co.*, 220 U. S. 107, Ann. Cas. 1912B, 1312, 55 L. Ed. 389, 31 Sup. Ct. Rep. 342, which involved

the discussion of the corporate franchise tax in the Tariff Act of 1909. The committee accepted the recommendation, and the Act of 1917 was drafted from the Tariff Act of 1909."

If this be correct, and a comparison shows that the language of the Tariff Act was followed almost *verbatim*, then the following interpretation placed upon this language in *Flint v. Stone Tracy Co.*, *supra*, is very helpful: "Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject matter of the tax imposed in the Act under consideration. \* \* \* In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. \* \* \* The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, *i. e.*, with the advantages which arise from corporate or *quasi* corporate organization. \* \* \* The thing taxed is not the mere dealing in merchandise, in which the actual transactions may be the same, whether conducted by individuals or corporations, but the tax is laid upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals. These advantages are obvious, and have led to the formation of such companies in nearly all branches of trade. The continuity of the business, without interruption by death or dissolution; the transfer of property interests by the disposition of shares of stock; the advantages of business controlled and managed by corporate directors; the general absence of individual liability—these and other things inhere in the advantages of business thus conducted, which do not exist when the same business is conducted by private individuals or partnerships. It is this distinctive privilege which is the subject of taxation, not the mere buying or \* \* \* handling of

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goods which may be the same, whether done by corporations or individuals."

Thus the conviction obtains that, the purpose of our Chapter 79, Laws of 1917, being the imposition of an excise upon the corporation for the privilege of doing business as such, and without regard to the character of the business, insurance corporations were intended to be within its purview.

Our attention is called to the facts that the corporations excepted from the provisions of the Act in section 1, subsection 16, and those whose "rate of license was to be changed by the new law as set forth in section 10" are to be found in the Chapter of the Political Code relating to the classification of licenses. "The reason for this," it is said, "is that the committee was dealing with the exercise of the licensing power of the state, and the fact that the legislature had exercised such power with reference to insurance companies \* \* \* was overlooked." The facts are as stated, and the explanation suggested may be correct; but neither the facts nor the explanation suffice to show a legislative intent to except insurance corporations from the Act. Such an intent could be asserted only on the assumption that the legislature was pursuing a general plan to exclude all corporations subject to license under the Chapter referred to. That this is not true is clear, for, though brewers licensed by section 2770 are excepted, and though the provisions (sections 2773, 2774, 2777) licensing telephone, telegraph, electric light, gas, water and express companies, common carriers and street railways are repealed, the pursuit of other lines of business equally open to corporations and licensed by the same Chapter—such as retail liquor dealers, theater proprietors, imitation butter merchants, tobacconists, venders of implements, contracting builders, maltsters, *etc.* (Rev. Codes, secs. 2758, 2759, 2763, 2766, 2778, 2779)—stands unrelieved by any provision of Chapter 79, Laws of 1917. Again, if the facts referred to could be said to indicate a general plan to except corporations subjected to license under prior laws, the omission from such a plan so obviously within its scope as in-

insurance companies, to say nothing of the other occupations just mentioned, would spell a purpose, under the familiar rule *expressio unius*, to omit that case from the operation of the plan. (*Spira v. State*, 146 Ala. 177, 41 South. 465.) As to [2] the explanation suggested, it is unavailing, because it cannot be verified, because a supposed unexpressed intention cannot override the clear import of the language employed, and because reasons sufficient may have appealed to the legislature to preserve the distinction between bodies corporate with their privileges and bodies not corporate, engaged in insurance and the other occupations above mentioned, while ignoring it in the case of brewers and public utilities.

(B) The proposition that, if Chapter 79, Laws of 1917, applies to insurance corporations, it repeals section 4017 involves considerations of (a) the general repealing clause contained in the Act first mentioned; (b) the abhorrence of the law for double taxation; and (c) the doctrine of implied repeal. Section 4017 provides: "All insurance corporations, associations and societies as hereinbefore specified in the preceding section, before commencing to do business in the state of Montana, shall be required to secure a license, authorizing them to transact business of insurance corporations, associations or societies, and shall pay to the state auditor for such license the following fees: For a license to collect in any one year premiums amounting to the sum of five thousand dollars or less, one hundred and twenty-five dollars. For a license to collect in any one year premiums over the sum of five thousand dollars, the sum of twenty dollars for each and every one thousand dollars to be so collected. \* \* \* " The history of this and cognate statutes up to 1903 will be found reviewed in *Northwestern Mutual Life Ins. Co. v. Lewis & Clarke County*, 28 Mont. 484, 98 Am. St. Rep. 572, 72 Pac. 982. From this decision and subsequent legislation it will be gathered that the legislature did not always deem the license fee exacted by section 4017 entirely adequate, for up to 1911, section 4073, Revised Codes, also existed, imposing an additional tax on in-

insurance companies based upon the excess of premiums collected over losses paid. By the Act approved March 2, 1911 (12th Sess. Laws, p. 131), Code section 4073 was repealed, leaving the companies for the time being under the sole burden imposed by section 4017; but in the case just cited the essential distinction between the two enactments was clearly pointed out.

(a) In the light of this decision we are enabled to say that section 4017 and Chapter 79, Laws of 1917, are not coterminous, either in language or purpose. The range of the former is over all insurance companies, whether corporate or not, and it is confined to them; the range of the latter is over all corporations save those excepted, without regard to the business pursued, and it does not apply to unincorporated concerns. One is unconditional, requiring no net income, imposing a license to carry on a particular business subject to control by a specific department of the state, and fifty per cent of all licenses collected from fire insurance companies under it must be paid to the treasuries of cities for the benefit of the firemen's disability fund (Laws 1915, Chap. 49); the other is conditional, requires a net income, imposes an excise upon the valuable privilege of doing business as a corporation measured by that income, and its principal purpose is the raising of revenue for the exclusive use of the state. There is therefore no manifest conflict between the two enactments; if they touch at any point, it is not in a way to interfere with the operation of either; hence the general repealing clause cannot be successfully invoked.

(b) This is not a case of double taxation in any proper acceptance of that term. We are ready to concede that an intention to impose double license burdens is not to be presumed, although no provision of the Constitution may inhibit them. This, however, refers to impositions upon the same person for the same thing; and the only warrant for the assertion that such is the effect of Chapter 79, Laws of 1917, in connection with Code section 4017, is in the fact that both are called licenses; and, where the insurance company is a corporation,



both may be exacted.—But they are not for the same thing. Reverting again to the Tariff Act of 1909, from which it is said that Chapter 79 was taken, it may be noted that by other federal statutes brewers, rectifiers and dealers in tobacco were required to pay license fees for engaging in those pursuits, yet it never was, nor in the light of *Flint v. Stone Tracy Co.* could be, contended that a corporation thus engaged was relieved of either the license or the excise. Are we to suppose that in virtue of Chapter 79, Laws of 1917, the provisions of the Code (sections 2758, 2759, 2763, 2766, 2778, 2779) imposing an occupation license upon retail liquor dealers, theater proprietors, imitation butter merchants, tobacconists, venders of implements, contracting builders, maltsters, *etc.*, are repealed where the agency is corporate and in force where it is not? On what basis of equality could an unincorporated malting concern be required to pay an occupation license while its incorporated rival is exempt? The question is a fair one, because the fact that the corporation may, but need not, be taxed as such is wholly beside the matter of occupation wherein the two are on a level. Indeed, it would be as difficult to show, and would exhibit a strange confusion of ideas to attempt the task, why a corporation taxable as such should be relieved of its occupation charge, as that an unincorporated concern, pursuing a licensed occupation, but not enjoying any of the privileges or immunities of corporate capacity, should pay a corporate excise. The things are separate and distinct; if a concern presents either, it is subject to pay accordingly, and if it presents both, it must pay for both. (See *Northwestern etc. Ins. Co. v. Lewis & Clark County*, *supra*.)

(c) As there is not any conflict or crossing of purposes between the two statutes, the above considerations dispose of the [5] contention for an implied repeal as well as of the suggestion following Sutherland (Statutory Construction, sec. 158) that: "Unless there is plain indication of an intent that the general Act shall repeal the special, the latter will continue to have effect and the general words with which it conflicts will

be restrained and modified accordingly." We may add that if section 4017 be viewed as special in character, while Chapter 79, Laws of 1917, is looked upon as of a general nature—which distinction we do not clearly see—then the rule is that the former is not to be considered as repealed by implication. (36 Cyc. 1087.)

(C) It is argued, however, that if Chapter 79, Laws of 1917, does apply and does not repeal section 4017 then it is invalid, because its title is defective, because it violates the state Constitution (sec. 27, Art. III; sec. 26, Art. V), and because it is inimical to the Fourteenth Amendment to the federal Constitution.

The title is not open to any objection. It is comprehensive [6] and not misleading; it states the purpose of the Act with precision, and the only thing the matter with its reference to the statutes to be repealed is a misplaced quotation mark; this is not enough to bring it within the case of *State v. Mitchell*, 17 Mont. 67, 42 Pac. 100, cited to condemn it.

The constitutional objections are twofold, *viz.*, that no basis exists for the distinction whereby insurance corporations are required to pay a double license while other corporations covered by the Act are not, and that the discrimination between corporations engaged in business wholly within this state and those engaged in business partly within and partly without the state is indefensible.

Assuming, for argument's sake, that insurance corporations are required to pay a double license, while other corporations [7] covered by the Act are not, the objection, if valid, would go to the statute making the distinction, which in this instance would be 4017, not Chapter 79, Laws of 1917, and the same complaint would be open to corporations engaged in malting, running a theater, construction, *etc.* The objection, however, is not valid. As between insurance corporations and other corporations covered by the Act, there is no distinction in virtue of the Act; the distinction arises under authority of section 4017, out of the occupation pursued, and occupation has al-

ways furnished ground for license classification, whether as to the amount imposed or as between subjection to and immunity from imposition. (*State v. Hammond Packing Co.*, 45 Mont. 343, 123 Pac. 407.)

From the portions of sections 2 and 3 of the Act above [8] quoted, it will be gathered that a distinction is made between corporations whose business is and those whose business is not wholly within this state, in that the former are and the latter are not authorized in ascertaining net income to deduct taxes and license fees imposed by authority of the United States or any foreign country. At first blush this seems an invidious and baseless discrimination, but upon more careful scrutiny we can see that the discrimination was not only just, but necessary, if anything like an equality of burdens was to be attained. A corporation whose business is wholly within this state presents a case where the basis of every public demand, state, national or foreign, is here; that business constitutes its only resource available to answer such demands, and a balance struck between that business and those demands in connection with the other deductions allowed is a true measure of its net income. Essentially different is the situation presented by a corporation of the other class; its business may be partly local, partly interstate, partly within some other state, and it would be very remarkable adjustment of burdens which should shift to the business done within this state, and thus relieve all its other business, the load created by authority without the state and properly chargeable to its interstate business, or, as the case may be, to its business conducted wholly within another state; for such a corporation a true measure of its net income taxable by this state is, as the statute has it, the difference between its business here and the burdens here imposed in connection with the other deductions allowed, leaving to its business elsewhere the burdens imposed by authority elsewhere. This arrangement leaves the two classes upon a substantial equality; any other would give to the corporation whose business is not wholly within this state a considerable advantage.

[9] Foreign corporations, assuming the apparent distinction here involved to be as between them and domestic corporations, which it is not, cannot complain that they are not given advantages over those created by authority of the state. (*Southern Ry. Co. v. Greene*, 216 U. S. 400, 54 L. Ed. 536, 17 Ann. Cas. 1247, 30 Sup. Ct. Rep. 287.)

We think the statute is squarely within all the rules touching reasonable classification for the purpose of responding to public charges.

The judgment is therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Rehearing denied July 11, 1918.

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TRUMPER ET AL., RESPONDENTS, v. SCHOOL DISTRICT  
No. 55, ET AL., APPELLANTS.

(No. 4,209.)

(Submitted June 13, 1918. Decided June 20, 1918.)

[173 Pac. 946.]

*Public Schools—Teachers' Pensions—Statutes—Constitution.*

Teachers' Pensions—Statute—Constitutionality.

1. *Held*, that Chapter 95, Laws of 1915, providing for teachers' pensions, is not invalid as in contravention of sections 3 and 23 of Article III; section 26, Article V, and section 11, Article XII, of the state Constitution, nor as offending against the clauses of the federal Constitution prohibiting the taking of property without due process of law and denying the equal protection of the laws (Fifth and Fourteenth Amendments, U. S. Const.)

Statutes—"Special," "Private" and "Local" Acts.

2. A "special" or "private" Act is one operating only on particular persons and private concerns; a "local" Act is one applicable only to a particular part of the legislative jurisdiction.

[As to what are local or private Acts, see notes in 23 Am. Dec. 543; 1 Am. St. Rep. 903.]

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For authorities discussing the question of constitutionality of teachers' pension law, see note in L. R. A. 1918A, 526.

Teachers' Pensions—Validity—Legislative Questions.

3. With economic defects and objections having to do with matters of detail in the scheme of teachers' pensions provided by Chapter 95, Laws of 1915, courts are not concerned, such considerations being for the legislature.

*Appeal from District Court, Musselshell County; A. C. Spencer, Judge.*

ACTION by May Trumper, Superintendent of Public Instruction, and others, constituting the Public School Teachers' Retirement Salary Fund Board, against School District No. 55 of Musselshell County, Montana, and O. R. McVay, Clerk. Judgment for plaintiffs, and defendants appeal. Affirmed.

*Mr. W. M. Mercer*, for Appellants, submitted a brief.

Citing: *State v. Rogers*, 87 Minn. 130, 58 L. R. A. 663, 91 N. W. 430; *Hibbard v. State*, 65 Ohio St. 574, 58 L. R. A. 654, 64 N. E. 109; 35 Cyc. 1108; *People v. Raynes*, 198 N. Y. 539, 92 N. E. 1097; 15 Cyc. 578; *Billings Sugar Co. v. Fish*, 40 Mont. 256, 20 Ann. Cas. 264, 26 L. R. A. (n. s.) 973, 106 Pac. 585; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 203, 119 Pac. 554, 1 N. C. C. A. 720; *Colvill v. Fox*, 51 Mont. 72, 79, 149 Pac. 496; *State v. Policemen's Pension Fund*, 121 Wis. 44, 98 N. W. 954; 12 C. J. 1020; *People v. Coler*, 173 N. Y. 103, 65 N. E. 956.

*Mr. S. C. Ford*, Attorney General, and *Mr. R. L. Mitchell*, Assistant Attorney General, for Respondents.

MR. JUSTICE SANNER delivered the opinion of the court.

This appeal assails the validity of Chapter 95, Session Laws of 1915—particularly sections 1, 4, 5, 13, 14, 15, 16, 17 and 18—known as the "Teachers' Pension Law," held by the judgment below to be valid and enforceable. In substance, these provisions are: Section 1, creating the public school teachers' retirement salary fund and the public school teachers' permanent fund, the latter made up of "contributions made by

teachers as hereinafter provided," income and interest, donations, legacies, gifts or bequests and "appropriations made by the state legislature from time to time to carry into effect the purposes of this Act." Section 2. The retirement salary fund shall be made up of moneys transferred from the permanent fund. Section 4. "There shall be deducted from the salary of every teacher," subject to the provisions of the Act, one dollar from each month's compensation, to be placed in said permanent fund. Section 5. "No person shall be eligible to receive the benefits of this Act who shall not have paid \* \* \* an amount equal to twelve dollars for each year of service, up to and including twenty-five years." Section 13. Every teacher of twenty-five years' service, the last ten of which shall be in this state, is entitled to retirement and to receive during life an annual retirement salary of \$600, in quarterly installments. Section 14. Any teacher who shall have served as such or as a school officer for fifteen years, and who by infirmity shall become incapacitated, may be retired or may by proper authority be compelled to retire and shall receive an annual retirement salary in proportion to length of service. Section 15. The authorities shall determine what constitutes a school year. Section 16. The Act is binding on such teachers employed in the public schools of this state at the time of the approval of the Act, as shall on or before January 1, 1916, signify their agreement accordingly, and (section 17) upon all teachers elected or appointed after the approval of the Act. Section 18. If any retired teacher shall be re-employed in the schools, the retirement salary shall be suspended during such period of re-employment, and any teacher retired for disability or on less than twenty-five years of service who returns to service and later qualifies for retirement, the retirement salary on such second retirement shall be reduced so as to cover the amounts paid on the first retirement.

The objections urged to this legislation, so far as they are [1] cognizable by this court, are constitutional in character. They are not very clearly stated, but from the argument of the appellants' brief we infer the contentions to be that it violates

the state Constitution (secs. 3 and 27, Art. III; sec. 26, Art. V, and sec. 11, Art. XII) as well as the Fifth and Fourteenth Amendments to the national Constitution. In substance, the provisions thus invoked are: The declaration that all persons possess the inalienable right of acquiring, possessing and protecting property; the guaranties that no person shall be deprived of life, liberty or property without due process of law, or be denied the equal protection of the laws; the prohibition against the passage of local or special laws for the management of the common schools; the requirement that taxes shall be uniform and laid by general laws for public purposes. The most cursory examination of the statute thus assailed will disclose that the constitutional propositions insisted upon are inapplicable.

There is no question of taxation involved. The legal relation of the state through its several boards of school trustees with the teachers employed by it is one of contract. It has the right to say upon what terms it will hire or authorize the hiring of persons to teach in its schools. It may, if it sees fit to do so, discriminate in the terms of its contracts upon any basis it chooses to adopt or upon no basis at all. Here it has said to all teachers employed after the approval of the Act: "Your contract shall have read into it the provisions of this Act; the salary you receive shall in all cases be one dollar per month less than the amount expressed in your contract, that dollar to go into the teachers' pension fund for your benefit when you become entitled to it; you may engage or not upon these terms, just as you like." When the teacher engages, it is an acceptance of the terms, and all discussion based upon the theory of taxation, having in mind that taxes are *in invitum*, is irrelevant. (*Allen v. Board of Education*, 81 N. J. L. 135, 79 Atl. 101.)

Neither, assuming the appellants can raise the question, is there any taking of property from the teachers, with or without due process of law, or any invasion of their right to acquire, possess, and protect property. The effect of the Act being as above stated, it results that the salary to be paid is a net

amount after the "contributions" or "deductions" prescribed. It is not a gross amount, and thus in fact there is no taking. As declared by the supreme court of Wisconsin on a slightly different but essentially similar occasion: "Though called part of the officer's compensation, he never received it or controlled it; nor could he prevent its appropriation to the fund in question. He had no such power \* \* \* over it as always accompanies ownership of property. Being a fund raised in that way, it was entirely at the disposal of the government, until, by the happening of one of the events stated, \* \* \* the right to the specific sum promised became vested in the officer or his representative." (*State v. Police Pension Fund*, 121 Wis. 44, 98 N. W. 954.)

The Act is said to involve a denial of the equal protection of the laws, "in that payment is made by consent with some teachers and is compulsory with others." This is not correct. The deductions are by consent or contract in all cases, the mode of assent only being different as between teachers having contracts when the Act went into effect, and those who contract after the approval of the Act and in contemplation of its terms. This distinction is as it should be. It certainly affords no ground of complaint by these appellants.

The prohibition against local or special laws cannot be invoked. A "special" or "private" Act is a statute operating only on particular persons and private concerns; a "local Act" is an Act applicable only to a particular part of the legislative jurisdiction. The law in question here operates throughout the state and uniformly upon all who are subject to its provisions. It is thus not local or special, but a general law. (36 Cyc. 986; *Hersey v. Neilson*, 47 Mont. 132, Ann. Cas. 1914C, 963, 131 Pac. 30; *State ex rel. Bray v. Long*, 21 Mont. 26, 52 Pac. 645.)

Counsel for appellants cites several authorities to support his views, but none are in point except *Hibbard v. State*, 65 Ohio St. 574, 58 L. R. A. 654, 64 N. E. 109, and with that decision [3] we cannot agree. Some criticism is also voiced touching



the details of the scheme created by the Act in question and its alleged economic defects, but such considerations are for the legislature.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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STATE, RESPONDENT, v. MULLINS, APPELLANT:

(No. 4,174.)

(Submitted June 14, 1918. Decided June 21, 1918.)

[173 Pac. 788.]

*Criminal Law—Grand Larceny—Possession of Stolen Property  
—Evidence—Circumstantial Evidence—Insufficiency.*

**Grand Larceny—Possession of Stolen Property—Evidence.**

1. Possession of property recently stolen is only a strong circumstance indicating guilt, not alone sufficient to warrant conviction of the offense of larceny.

**Same—Circumstantial Evidence—When Sufficient.**

2. When a conviction is sought upon circumstantial evidence, the proof must be such as not only to authorize a belief in the guilt of the accused, but also to exclude every other reasonable hypothesis.

[As to circumstantial evidence, see notes in 62 Am. Rep. 179; 97 Am. St. Rep. 771.]

**Same—Conviction—Quantum of Evidence Required.**

3. One charged with crime may be convicted only upon evidence establishing his guilt beyond a reasonable doubt, *i. e.*, upon proof such as to logically compel the conclusion that the charge is true.

**Same—Evidence—Insufficiency.**

4. Evidence held insufficient to warrant conviction of the crime of grand larceny.

*Appeal from District Court, Beaverhead County; Jos. C. Smith, Judge.*

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Authorities discussing the question as to whether possession of recently stolen property is evidence of burglary and larceny are collated in a note in 12 L. E. A. (n. s.) 199.

BENJAMIN MULLINS was convicted of grand larceny, and from the judgment and an order denying his motion for new trial, he appeals. Reversed and remanded.

*Mr. John Collins*, for Appellant, submitted a brief and argued the cause orally.

The evidence tended to show wrongful conduct of defendant after the theft, rather than participation in the theft. This presented a new phase which required a proper instruction, so that the jury might not, in their confusion, convict the defendant of a theft of which they might not think him guilty, even though they believed him guilty of an offense subsequent to the taking. (*State v. Gilmer*, 97 N. C. 429, 1 S. E. 491; *Smith v. State*, 7 Tex. App. 414; *Noland v. State*, 3 Tex. App. 598; *Riojas v. State*, 8 Tex. App. 49; *Davis v. State*, 10 Tex. App. 31.)

The court gave abstract principles of the law of larceny which, perhaps, illustrated the theory of the state, but no instruction by which the jury might be advised as to the liability to or immunity from punishment of a person charged with larceny, and whom the jury might reasonably believe to be guilty, merely as an accessory after the fact. The jury was left to apply the principles as best they could. (*State v. Trosper*, 41 Mont. 442, 109 Pac. 858; *Wasson v. State*, 3 Tex. App. 474.) The giving of statutory definitions will not suffice. (*Heath v. State*, 7 Tex. App. 464; *Rutherford v. State*, 15 Tex. App. 236; *Jones v. State*, 33 Tex. Cr. 492, 47 Am. St. Rep. 46, 26 S. W. 1082.)

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

By an information filed in the district court of Beaverhead county G. H. Moller and Benjamin Mullins were jointly charged with the crime of grand larceny, in that on or about

the 13th of July, 1917, they did steal, take and carry away 1,000 pounds of wool of the value of \$500, the property of P. A. Dansie. Both the accused were apprehended, but pending trial Moller died. Mullins was arraigned, pleaded not guilty, and upon his trial was convicted. From the judgment as well as from an order denying his motion for new trial he appeals, and the grounds upon which a reversal is sought are the refusal of two offered instructions and that the evidence is insufficient to justify the verdict.

The salient material features as presented by the state are: P. A. Dansie, a wool-grower residing near Daly's Spur, about fourteen miles south of Dillon, was in the fore part of July engaged in hauling his wool and loading it on cars at Daly's Spur. He needed men, and through his brother at Dillon hired Mullins and one other man whose name is not given. Mullins had arrived in Dillon a day or two before and was seen with Moller, who introduced him to Opp as an old acquaintance. Mullins appeared at Dansie's on Tuesday, July 10, working there the afternoon of that day and the whole of the following two days, quitting on Friday, the 13th. On Wednesday, the 11th, he borrowed a horse from Dansie to go to the public telephone station at Henneberry's, Dansie having no telephone. Henneberry's is a short distance away, and Mullins said as he left, "I am wanted at Helena as a witness," or that he had to phone to Helena because he was wanted as a witness there. Arriving at the station, he had Henneberry call up Moller, who was working for Sullivan's barn at Dillon. He spoke a few sentences to Moller which Henneberry did not hear, except the last phrase, which was, "at Daly's Spur," or "I am at Daly's Spur." Shortly after Mullins began to work one of the wagons broke a tongue, and Dansie sent to Dillon for another tongue and a reach, expecting them to arrive on the local freight Thursday evening, July 12. He mentioned the matter at supper, and Mullins offered to go to the station to see if they had come. Mullins went, and had not returned to the ranch at 10:30 that evening. On the same or

the next evening Dan Sullivan went to his barn at 11:30, expecting to find Moller, who had charge at night. Moller was not there, but was out with the mule team, as Sullivan was told, and had left the barn in charge of one Naylor. On Friday morning Moller paid Opp, the day man at the barn, \$10 for a drive which Moller said he had made with the mule team the night before. Mullins quit Dansie's Friday morning, taking a check for \$9, the wages due him, but before he left he was heard to ask a fellow-employee for a loan of fifty cents to pay his fare to Dillon. Saturday morning at 6:30 or 7 o'clock Moller, accompanied by Mullins, came to the house of Bassett, a dealer in hides, pelts and wool, driving the Sullivan mule team and a wagon loaded with 619 pounds of wool in small sacks. Moller reported to Bassett that the wool had been shorn from a stray band and sold it to Bassett for \$309.50. Bassett gave his check, which Moller cashed. Mullins took no part in these transactions except to hold the team which seemed to be bad. Later in the day Bryan saw Mullins at a saloon in Dillon buying drinks, and Mullins showed a roll of money containing at least five \$20 bills. The Dansie wool arrived at Dillon on Monday the 16th, when it was ascertained that three sacks of it were gone. The wool sold to Bassett was identified as Dansie's. The sacks in which it had been first packed were found behind Sullivan's barn. There was also evidence in the loft of Sullivan's barn that wool had been handled there.

That this evidence suffices to establish Moller's guilt need not be doubted. That one may conjecture circumstances which will show an opportunity in Mullins to take part in the stealing and which, together with the proven facts, would justify a strong suspicion against him cannot be questioned. But how, as it stands, shall this evidence be said to command the inference, so that one may say beyond reasonable doubt that Mullins took part in the stealing, or, being present, aided and abetted therein, or, not being present, had advised or encouraged the same? The only positive fact implicating Mullins is that he and Moller drove to Bassett's, where he held the team while

Moller sold the wool; and, assuming Moller's possession to be [1] that of Mullins, still possession of property recently stolen is only a strong circumstance, not alone sufficient to warrant conviction (*State v. Trosper*, 41 Mont. 442, 109 Pac. 858); [2] for, when a conviction is sought upon circumstantial evidence, the proof must be such as not only to authorize a belief in the guilt of the accused, but also to exclude every other reasonable hypothesis (*State v. Postal Tel. Co.*, 53 Mont. 104, 161 Pac. 953). Is it unthinkable that the wool may have been stolen at some other time than Thursday evening; that Mullins may not have been present at the time; that Mullins may have known nothing of the stealing; that he may have believed the wool to be Moller's; that his aid in transporting it to Bassett's may have been innocent, or at least without guilty knowledge; that the money he exhibited on Saturday may have come from some other source? Grant that the conjectures, the suspicions, [3] the probabilities are all the other way, a defendant may not be convicted on conjectures, however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond reasonable doubt, that is, upon proof such as to logically compel the conviction that the charge is true. (*State v. Taylor*, 51 Mont. 387, 153 Pac. 275; *State v. Postal Tel. Co.*, *supra*.)

The case made by Mullins, so far from aiding, tends rather [4] to shake, the tentative suspicions aroused by that of the state. These are the important circumstances against him: (a) His message to Moller on Wednesday; (b) his absence from the ranch on Thursday evening; (c) Moller's absence from the barn on Thursday evening; (d) Mullins' quitting Dansie's on Friday; (e) Mullins' presence with Moller at Bassett's on Saturday morning; (f) Mullins having funds on Saturday afternoon; and upon them he sheds considerable light. (a) As to the message he expresses surprise that Henneberry did not hear it all; he was wanted as a witness in a case which he understood had been transferred to Helena; he expected mail concerning it to come to him at Dillon; he called Moller

to instruct that his mail should be held there, as he intended to quit Dansie's, and his last sentence was to say that he was then at Daly's Spur. Some confirmation of this lies in the fact that he says—and is not contradicted—that he exhibited to the county attorney a subpoena calling him in the case to which he referred. (b) Whether Mullins was absent from the ranch on Thursday depends altogether on when the new tongue and reach arrived, for that, according to Dansie, was the occasion of his going to the station. Dansie says they were to come by local freight. The records of the Dillon Implement Company show that the order for them was filled, and they were turned over to the express company at Dillon for shipment on Tuesday, the 10th. As Daly's Spur is only fourteen miles from Dillon, the likelihood is they arrived on the same or the next day. Mullins says they arrived on Tuesday the 10th and he got them that night. If so, his absence to go for the tongue and reach, which was his only absence, save for the short journey to the telephone, does not at all fit the case of the state on any theory of co-operation with Moller in the theft. (c) Whether Moller's absence from the barn was on Thursday or on Wednesday is left somewhat in doubt. In either case, however, it had no such relation as the state assumes to Mullins' absence from the ranch when he went after the tongue and reach, if that event occurred on Tuesday. (d) Mullins explains his quitting on Friday by saying that his working mate was lazy and did not do his share, and he got tired of working for two. This is confirmed to some extent by Dansie himself, who testified of complaints or rumors about Mullins' working mate; only Dansie thought the man was sick. (e) Mullins had known Moller prior to coming to Dillon, had stopped with him on first arriving at Dillon, and his stopping with Moller on Friday night was not of itself unnatural. Being Moller's guest, he might properly, as he says he did, assist Moller to load some wool from the barn loft to the wagon, and might, as he says he did, have accepted Moller's assurance that the wool was his and had come from stray sheep. If the wool was in small sacks

when Mullins first saw it, as he says it was, he could not know that it belonged to Dansie and would have no reason for refusing to hold the team while Moller sold and unloaded it. So far as the record shows, the transaction was not so covert as to compel either suspicion or caution on the part of Mullins toward the man who had harbored him. Moreover, Mrs. Bassett testified that after this Moller appeared again with another person and a load of wool which he sold to Bassett. (f) The episode of the money occurred in a saloon. There was drinking, Bryan says four or five rounds, and at what stage of the festivities Bryan saw the money does not appear. Mullins says he had several bills, only one of which was a twenty, the others being "1's," not to exceed \$26 in all, part of which he had left at Dillon on his way down to Dansie's and recovered on his return.

We may not, of course, usurp the functions of the jury in this case, who were best able to judge of the candor, and thus the credibility, of the witnesses; but we must say that the written record of defendant's testimony creates a favorable impression and persuades one to the belief that his conviction is largely due to the facts that Mullins and Moller were friends, that Mullins was with Moller when the wool was sold, and that Mullins ought to have known, and therefore did know, that Moller was selling stolen wool. And it was against just this contingency that the appellant was struggling in the instructions offered. No. 1, we think, was properly refused as too abstract and as covered. Nor can we impute fault to the trial court for refusing No. 3, because the last sentence of it was vague and misleading; but Mullins was, we think, entitled to have the substance of it given more definitely than appears in the instructions as read to the jury, and this will doubtless be done on a retrial of the case.

There is no prejudicial error among the assignments presented to us, save the refusal of a new trial for insufficiency of the evidence.

For this the judgment is reversed and the cause remanded for new trial.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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STATE EX REL. CITY OF BILLINGS, APPELLANT, v. BILLINGS GAS CO., RESPONDENT.

(No. 4,033.)

(Submitted June 13, 1918. Decided June 24, 1918.)

[173 Pac. 799.]

*Cities and Towns—Powers—Gas Franchise—Rates—Regulation  
—Public Utilities Commission—Statutory Construction—Constitution.*

Cities and Towns—Gas—"Franchise."

1. The right granted to a company under ordinance to use streets for laying mains and supplying inhabitants with gas is a "franchise."

Same—Acceptance of Franchise—Effect.

2. Acceptance of a franchise which contains terms constitutes a contract between a city and a gas company if the city had authority to make such contract.

Same—Public Utility Rates—Right to Fix.

3. There is a well-defined distinction between authority of a city to regulate public utility rates from time to time, and authority to fix rates by contract for a definite period.

Same—Public Utility Rates—Right to Alter.

4. Where a city has entered into a binding contract with a public utility, fixing rates for a definite period, it surrenders for the duration of the contract its governmental function of rate regulation so far as altering contract rates is concerned.

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On power of municipality to fix gas rates as an incident of its power to authorize the laying of gas-mains, see note in 18 L. R. A. (n. s.) 1197.

For authorities discussing the question of power of municipality apart from contract to regulate the rates to be charged by public service corporations, see notes in 33 L. R. A. (n. s.) 759 and 43 L. R. A. (n. s.) 995.



**Same—Powers—How Determined.**

5. A city has only such authority as is conferred upon it by express legislative declaration, or by necessary implication, and any doubt as to the existence of a particular power will be resolved against a city, and right to exercise such power denied.

**Same—Powers—Burden of Proof.**

6. Since a city exercises only limited delegated authority, anyone claiming the benefit of a city's act has the burden of showing that it acted within the scope of its authority.

**Same—Gas—Granting Franchise—Approval of Electors.**

7. A city cannot grant a franchise for supplying inhabitants with illuminating gas until the application for it has first been submitted to and approved by its qualified electors.

**Same—Franchise Contract—Unreasonable Terms—Effect.**

8. A city cannot bind its inhabitants by a contract unreasonable in its terms.

**Same—Public Utility Rates—Regulation—Presumptions.**

9. Rate regulation of public utilities is a legislative function of the state, and since the effect of a grant to a city to enter into a contract with a public utility for specific rates for a given period is to extinguish *pro tanto* a governmental power of first importance, the courts will not indulge the presumption that such a surrender of power has been made, but the legislative intention must be expressed in clear and unmistakable language or necessarily implied from the powers expressly granted, before it can be held that the state has precluded itself from the function of rate regulation and control.

**Same—Public Utility Rates—State Regulation.**

10. Under section 3,259, subdivisions 63 and 73, Revised Codes, a city may contract for rates with a public utility, subject, however, to the paramount authority of the state (see par. 9 above) to exercise its power in the premises whenever it chooses to do so.

**Same—Regulation of Gas Rates—Constitution—Impairing Obligation of Contracts.**

11. Inasmuch as a franchise contract made in 1912 between a city and a gas company must be presumed to have been entered into with knowledge that the state could thereafter enact legislation toward exercising the power of rate regulation reposed in it, and thus change the rates fixed by the contract (see paragraphs 9 and 10 above), Chapter 52, Laws of 1913, creating a public utility commission with power to regulate rates, *etc.*, is not open to attack on the ground that it impairs the obligation of the contract made the year before.

**Same—Regulation of Rates—Statutory Construction.**

12. *Held*, that the concluding sentence of section 12 of the Act of 1913, to-wit: "This, however does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts," refers to the sentence immediately preceding—which forbids rebates, concessions, *etc.* and was not intended to except from the operation of the Act rate contracts made between cities and public utilities prior to its passage.

**Same—Gas Rates—Filing With Utilities Commission—Effect.**

13. The rates required by section 11 of the Act establishing the Public Utilities Commission (Chap. 52, Act of 1913) to be filed by public utilities with the commission as in force at the time of filing, become the legal rates without affirmative action by the commis-

sion, and remain so until changed in the manner provided by the Act.

[As to the validity of statute conferring upon public service commission power to fix rates for public service corporations, see note in ANN. CAS. 1917C, 57.]

*Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.*

ACTION by the State, on the relation of the City of Billings, against the Billings Gas Company. Judgment for defendant, and the city appeals. Affirmed.

*Mr. Thad. S. Smith and Mr. J. H. Johnston*, for Appellant, submitted a brief; *Mr. Johnston* argued the cause orally.

The Billings Gas Company, under its own theory of the case, by virtue of the contract with the city of Billings, has been accorded valuable rights, concessions and privileges, and in consideration thereof but one obligation or duty is imposed upon the company, namely, to furnish gas to the city of Billings and its inhabitants, in accordance with the stipulations of the contract. "Where a municipality grants the right to use streets for gas-pipes, it may provide that the charge for gas furnished the city and its inhabitants shall not exceed certain prices, without regard to whether the municipality has the power to regulate the rates of the company." (McQuillin on Municipal Corporations, secs. 1644, 1738; *Helena Light & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446; *Vicksburg v. Vicksburg Water Works*, 206 U. S. 496, 51 L. Ed. 1155, 27 Sup. Ct. Rep. 762; 12 R. C. L. 878.) Mr. Thompson recognizes the principle for which we contend, and concedes that the public utility company waives its right to object to an ordinance when it accepts the same. (3 Thompson on Corporations, p. 883; 12 R. C. L. sec. 38; *Illinois Trust & Sav. Bank v. Arkansas City*, 76 Fed. 271, 34 L. R. A. 518, 22 C. C. A. 171; *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15; *Cleveland v. Cleveland City R. R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756; Pond on Public Utilities, sec. 5.)

It is elementary that the city itself would be estopped to repudiate the terms of this contract. (28 Cyc. 1044.) So the doctrine of estoppel has often been applied when the question of the validity of an ordinance has been raised. Thus, a railroad corporation which accepts the benefit of an ordinance will be estopped from thereafter denying its validity. (McQuillin on Municipal Corporations, sec. 797; *St. Mary's v. Hope Natural Gas Co.*, 71 W. Va. 76, 43 L. R. A. (n. s.) 994, 76 S. E. 841.)

*Messrs. Nichols & Wilson*, for Respondent, submitted a brief; *Mr. Harry Wilson* argued the cause orally.

Our contention is that the state of Montana having expressly reserved in itself the right to fix rates of the character under discussion, the city has no authority to fix, control or regulate them either by ordinance or contract. Had it been intended to vest in cities the power to regulate gas, water or electric light rates, such power would have been expressly delegated. Not having been so delegated, either expressly or by necessary implication, it follows that the city does not possess this power, and certainly a power which it does not possess at all cannot be exercised by contract any more than it can by ordinance. (Smith on Municipal Corporations, sec. 726; McQuillin on Municipal Corporations, p. 3718; *Home Tel. & Tel. Co. v. Los Angeles*, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 50.) Counsel argue that even if the authority of the city to make the contract in this case was wanting in the first instance, the defendant company is now precluded from raising that question after having accepted the franchise and enjoyed the benefits thereof. This argument is not supported either by reason or authority. If it was without the power of the city to make the contract, it is equally without its power to enforce it. (*Central Trans. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 35 L. Ed. 55, 11 Sup. Ct. Rep. 478; *Board of Commrs. v. Lafayette etc. E. E. Co.*, 50 Ind. 85.)

The exercise of the police power of a state cannot be limited by contract for reasons of public policy, and it is immaterial upon what consideration the contract rests, as it is beyond the power of the state or the municipality to abrogate this power so necessary to the public welfare. (*Northern Pac. Ry. Co. v. Minnesota*, 208 U. S. 583, 52 L. Ed. 630, 28 Sup. Ct. Rep. 341; *C. B. & Q. Ry. Co. v. Nebraska*, 170 U. S. 57, 42 L. Ed. 948, 18 Sup. Ct. Rep. 513; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. Ed. 989; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. Ed. 1136; *New Orleans Gas Light Co. v. Louisiana L. & H. P. Co.*, 115 U. S. 650, 29 L. Ed. 516, 6 Sup. Ct. Rep. 252; *Mugler v. Kansas*, 123 U. S. 623, 31 L. Ed. 205, 8 Sup. Ct. Rep. 273; *Budd v. New York*, 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468.) No unconstitutional impairment of contract results so far as the city is concerned from a change by the state of rates fixed by a franchise granted by the municipality to a telephone company, if the municipal charter is subject to the general laws of the state. (*State ex rel. Webster v. Superior Court*, 67 Wash. 37, Ann. Cas. 1913D, 78, L. R. A. 1915C, 287, 120 Pac. 861.)

The power of rate regulation, being retained by the state, cannot be contracted away or interfered with by the city. (*State v. Sheboygan*, 111 Wis. 23, 86 N. W. 657; *Old Colony Trust Co. v. Atlanta*, 83 Fed. 43; *Portland Ry., L. & P. Co. v. Railroad Commission*, 56 Or. 468, 105 Pac. 709, 109 Pac. 273; *Keefe v. Lexington etc. R. Co.*, 185 Mass. 183, 70 N. E. 37.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In 1912 the city of Billings, by ordinance granted to W. B. Snyder, his successors and assigns, the right to lay gas mains and pipes in the streets, avenues and alleys and supply the inhabitants with illuminating gas. The ordinance fixed a maximum rate to be charged during the first two years, and provided that thereafter such rate should be reduced from time to time as the total annual consumption of gas increased to

certain stated amounts. The terms of the ordinance were accepted, and the gas company, succeeding to Snyder's interests, installed the plant and commenced operations in November, 1912.

In March, 1913, the legislature passed an Act, creating the Public Utilities Commission and defining its duties and powers. (Laws 1913, Chap. 52.) Immediately thereafter the gas company filed with the commission its schedule of rates then in force, and this schedule was approved. The company has likewise complied with the other provisions of the Act. In 1915 the total amount of gas sold by the company reached 30,000,000 cubic feet, and by the terms of the ordinance it was required to reduce its rate from \$1.80 per 1,000 cubic feet, to \$1.50 per 1,000 cubic feet, but it refused to make the reduction, and this action resulted. The city has appealed from a judgment in favor of the company, and presents for our determination the question: Can the company be compelled to reduce its rates in conformity with the terms of the ordinance, or is the subject of rate regulation and control now within the exclusive jurisdiction of the Public Utilities Commission?

It is conceded that this company is a public utility and subject to the provisions of the statute above. That statute provides that the commission shall have full power of supervision, regulation and control of the public utilities enumerated, "subject to the provisions of this Act and to the exclusion of the jurisdiction, regulation and control of such utilities by any municipality, town or village." (Section 3.) It provides, further, that the charges for heat, light, *etc.*, shall be reasonable (section 5); that every public utility shall file with the commission schedules of rates then in force; that no advance or reduction in rates shall be made thereafter without the approval of the commission (section 11); that any municipality or individual interested may complain to the commission of any existing rate (section 17), and, after a hearing, the commission may order into effect a different rate and enforce its order

by appropriate proceedings (section 31). Adequate penalties are prescribed for violations of the Act.

There are certain principles incidentally involved herein which may be stated by way of preface.

1. The right granted to the company to use the streets for [1] laying its mains is a franchise. (Pond on Public Utilities, sec. 398.)

2. The acceptance of the franchise, which contained terms, [2] constituted a contract between the city and the company, if the city had authority to make such contract.

3. There is a well-defined distinction between the authority [3] of a city to regulate public utility rates from time to time and the authority to fix rates by contract for a definite period. (4 McQuillin on Municipal Corporations, sec. 1733.)

4. When the city has entered into a binding contract with a [4] public utility, fixing rates for a definite period, it surrenders for the duration of the contract its governmental function of rate regulation, so far as altering the contract rates is concerned. (*Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368, 46 L. Ed. 592, 22 Sup. Ct. Rep. 410.)

5. A city of this state has only such authority as is conferred [5] upon it by express legislative declaration or by necessary implication (*Helena L. & Ry. Co. v. City of Helena*, 47 Mont. 18, 130 Pac. 446), and any doubt as to the existence of a particular power will be resolved against the city, and the right to exercise the power denied. (*State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695.)

6. Since a city exercises only limited, delegated authority, [6] anyone claiming the benefit of the city's act has the burden of showing that it acted within the scope of its authority.

7. A city is prohibited by section 3291, Revised Codes, from [7] granting a franchise of the character of the one now under consideration, until the application for it has first been submitted to and approved by the qualified electors, and this statute was in force at the time the franchise in question was granted.

8. A city cannot bind its inhabitants by a contract unreasonable in its terms. (*Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249.)

This case was submitted to the trial court upon an agreed statement of facts, which fails to disclose the term of years for which the franchise was granted, and likewise fails to show that the application for the franchise was first approved by a vote of the qualified electors. For either or both of these reasons the judgment should be affirmed, but counsel have ignored these defects, and have submitted the appeal upon the assumption that the franchise was granted properly, and that a valid contract resulted from its acceptance, if the city had the authority to contract for specific rates for any period. The city has not assumed to exercise a governmental function of rate regulation, but it does insist that it was clothed with authority to contract for maximum rates, and that the obligation of the contract which it has with the gas company cannot be impaired by the legislature.

If the city was authorized to enter into a contract of this character and there was no reservation in the contract of the city's right to regulate the rates, then it may be conceded that the contract is inviolable, and that the city is entitled to have the rate provision enforced. (*Cleveland v. Cleveland City R. Co.*, 194 U. S. 517, 48 L. Ed. 1102, 24 Sup. Ct. Rep. 756.) As evidence of its authority to make this particular contract, the city relies upon the provisions of paragraphs 63 and 73, section 3259, Revised Codes. With the introductory clause, those paragraphs provide:

"A city or town council has power: \* \* \*

"63. To make any and all contracts necessary to carry into effect the powers granted by this title, and to provide for the manner of executing the same. \* \* \*

"73. To permit the use of the streets and alleys of the city or town for the purpose of laying down gas, water and other mains," etc.

As heretofore observed, rate regulation of public utilities is [9] distinctively a legislative function of the state, and, though the state may confer upon a city authority to enter into a contract for specific rates for a given period, since the effect of such a grant is to extinguish *pro tanto* a governmental power of first importance, the courts will not indulge the presumption that such a surrender of power has been made, unless the legislative intention is expressed in clear and unmistakable language or is necessarily implied from the powers expressly granted, and all doubts will be resolved in favor of the continuance of the power. (*Home Tel. Co. v. Los Angeles*, 211 U. S. 265, 53 L. Ed. 176, 29 Sup. Ct. Rep. 50; Pond on Public Utilities, secs. 498, 502.) Neither paragraph 63 nor 73 in express [10] terms confers upon a city authority to fix rates. Can it be said that such authority is necessarily implied from the language used?

Provisions somewhat similar to the terms of these paragraphs are found in the statutes of many states, and, though they have been a fruitful source of litigation, the decisions are not harmonious, but in a general way it may be said that they form three distinct groups. The cases composing the first group hold that statutes of this character do not confer any rate-making power whatever. Typical cases are *Pioneer T. & T. Co. v. State*, 33 Okl. 724, 127 Pac. 1073; *St. Louis v. Bell Tel. Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 2 L. R. A. 278, 10 S. W. 197, and *Mills v. Chicago* (C. C.), 127 Fed. 731. Cases of the second group hold that such statutes by necessary implication confer the power to fix rates for a definite period, not unreasonable in extent. (*Boerth v. Detroit Gas Co.*, 152 Mich. 654, 18 L. R. A. (n. s.) 1197, 116 N. W. 628. See, also, Pond on Public Utilities, sec. 420.) In the third group are cases which hold that, though statutes of this character do not confer directly any rate-making authority, they do amount to a sort of tacit recognition by the state of the city's right to contract for rates, subject, however, to the paramount authority of the state whenever it chooses to exercise its sovereign power of rate regulation



and control. (*Milwaukee Elec. Ry. & L. Co. v. Wisconsin R. R. Com.*, 153 Wis. 592, Ann. Cas. 1915A, 911, L. R. A. 1915F, 744, 142 N. W. 491, 59 L. Ed. 1254, 238 U. S. 174, 35 Sup. Ct. Rep. 820; *City of Dawson v. Dawson Tel. Co.*, 137 Ga. 62, 72 S. E. 508.) The principle enunciated by this third group of cases has been recognized and acted upon in this jurisdiction for many years, and is in harmony with the general spirit and purpose of our laws.

If the state has clearly authorized the municipality to contract for the service of a municipal public utility and to fix the rates for a definite period, a contract made in pursuance of such authority cannot be set aside by the state, but it is only in those cases where the authority delegated to the municipality clearly confers upon it the power to agree upon rates for a definite period, and a contract has been made pursuant to such authority, that the state precludes itself from exercising its undoubted governmental function of rate regulation and control. (Pond on Public Utilities, sec. 503.)

We do not believe that it was the purpose of the legislature [11] by the very general language in the paragraphs cited to surrender fully the distinctively governmental function to regulate rates, but rather to permit municipalities to protect themselves and their inhabitants against extortionate rates until the state itself should act in the premises. Under this view it cannot be said that the Act of 1913 impairs the obligation of the franchise contract (assuming that the city can raise the question), for both parties to that agreement must have entered into it with full knowledge that in the state itself reposed the sovereign power of rate regulation. (*Manitowoc v. Manitowoc & N. T. Co.*, 145 Wis. 13, 140 Am. St. Rep. 1056, 129 N. W. 925; *Benwood v. Public Service Com.*, 75 W. Va. 127, 83 S. E. 295.)

But it is insisted on behalf of the city that the Act creating [12] the Public Utilities Commission intended to recognize all outstanding contracts of this character, and reference is made to the concluding sentence of section 12 of the Act. That sec-

tion first declares that it shall be unlawful for any public utility to collect a different rate from that contained in the schedules approved by the commission. It likewise forbids rebates, concessions or special privileges to any consumer which affects the rates, tolls or charges for the services furnished, and fixes the penalty for any violation and then concludes: "This, however does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts." It is very clear that this sentence refers to the preceding sentence of the section exclusively, and not to the terms of the Act in its entirety.

A consideration of the statute leads to the conclusion that in its enactment the legislature intended to provide a comprehensive and uniform system of regulation and control of public utilities, by a specially created tribunal, through which the state itself exercises its sovereign power.

Our conclusion is that since 1913 the Public Service Commission has had exclusive jurisdiction over the subject of rate regulation of this company, that the provisions of the franchise contract fixing rates were superseded by the rates approved by the commission, and that the remedy of the city is by complaint to the commission if the rates now in effect are excessive.

Finally, it is insisted that the commission has never established rates for this company, and until it does so, the rates fixed by the franchise contract should be enforced; but, under section 11 of the Act of 1913, existing utilities were required to file schedules of their rates with the commission, and thereafter no change in rates could be made without the concurrence of the commission. In other words, when the tariffs were filed, the designated rates became the legal rates until changed in the manner provided by the Act, and superseded the rates designated in the franchise contract.

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

## EBY, RESPONDENT, v. CITY OF LEWISTOWN, APPELLANT.

(No. 3,914.)

(Submitted May 4, 1918. Decided June 25, 1918.)

[173 Pac. 1163.]

*Cities and Towns—Special Improvements—Eminent Domain—  
Change of Street Grade—Compensation—Statute—Notice of  
Damage—Constitution—Evidence—Appeal and Error—Offer  
of Proof.*

**Appeal—Record—Sufficiency.**

1. Where the record on appeal contains certified copies of the papers making up the judgment-roll, the fact that it does not contain a copy of such roll made up and certified as such does not demand a dismissal of the appeal.

**Cities and Towns—Special Improvements—Statute—Constitution.**

2. *Held*, that section 13, Laws of 1913, which casts upon the owner of city or town realty embraced within the limits of a proposed special improvement district the burden of ascertaining the amount of damage likely to ensue to the property by reason of its creation, and making claim for the amount within a specified time or be debarred thereafter from doing so, is violative of section 14, Article III, Constitution, which forbids the taking or injuring of private property for a public use until compensation is *first* made or tendered.

**Statutes of Limitation—Nature and Purpose.**

3. Statutes of limitation are statutes of repose, their object being to suppress stale and fraudulent claims after the evidence of their payment has been lost, or the facts concerning them have become obscure from lapse of time or the defective memory, or death or removal of witnesses.

[As to the effect of the bar of the statute of limitations, see note in 95 Am. St. Rep. 656.]

**Cities and Towns—Changing Street Grade—Measure of Damages—Evidence.**

4. Evidence to show the cost of filling plaintiff's lots and raising his buildings to grade, and the market value of the property before and after making the improvement, was competent and material in an action to recover damages occasioned by the change.

**Same—Pleading—Evidence—Admissibility.**

5. Under allegations of the complaint that plaintiff's property had been permanently injured by change in street grade, rendered inaccessible and undesirable for the purposes for which used, necessitating large expenditures in filling and adjusting the lots to grade, etc., and defendant's denial of any damage whatever, the latter was entitled to introduce evidence tending to show that the prop-

On liability of municipal corporation for injury to abutting property from changing the grade of a street under a constitutional provision against "damaging" private property for public use without compensation, see notes in 36 L. R. A. (n. s.) 1194; L. R. A. 1915A, 382.

erty had not been injured or that the damage was less than claimed by plaintiff.

**Appeal and Error—Offer of Proof—When Unnecessary.**

6. The rule requiring an offer of proof by the party who desires to preserve for review a ruling sustaining an objection to a question put to a witness does not apply when the question indicates the evidence sought, or where the effect of the ruling is to exclude all evidence on a given subject under a mistaken notion that it is not within the issues.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by J. M. Eby against the City of Lewistown. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

*Messrs. I. B. Kirkland and Mr. Chas. J. Marshall*, for Appellant, submitted a brief; *Mr. Marshall and Mr. Oscar O. Mueller*, of Counsel, argued the the cause orally.

Compensatory damages in a case like this mean the difference in the fair market value of the property before and after the change in grade, unless such difference is more than it would cost to place the property back in the same relative position with respect to the new grade that it occupied with respect to the grade as it existed just prior to the change. No proof of the diminished value of the property was offered by the plaintiff. The evidence offered by the defendant that the property had not been diminished in value by reason of the change of grade and improvement of Janeaux Street, in front of plaintiff's property, was rejected by the court. Under the rulings of the leading courts of the country, in fact every state which this court would feel itself justified in following, the defendant is entitled to have the judgment in this case set aside and a new trial granted to it. The cases are taken from the courts of last resort of states where the constitutional provision regarding the taking of private property for public use, without compensation first being made therefor, is the same or similar to the constitutional provision of the state of Montana on that subject. (See *Enid & A. Ry. Co. v. Wiley*, 14 Okl. 310, 78

Pac. 96; *Pedetty v. Wisconsin Zinc Co.*, 148 Wis. 245, 134 N. W. 356; *Smith v. Kansas City* (Mo.), 30 S. W. 314; *Stroker v. City of St. Joseph*, 117 Mo. App. 350, 93 S. W. 860; *City of Rawlins v. Murphy*, 19 Wyo. 238, 115 Pac. 436; *Somers v. Metropolitan Elevated Ry. Co.* and *Bohm v. Metropolitan Elevated Ry. Co.*, 129 N. Y. 576, 14 L. R. A. 344, 29 N. E. 802; *Blair v. City of Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837, 35 L. R. A. 852, 26 S. E. 341; *Swift & Co. v. Newport News*, 105 Va. 108, 3 L. R. A. (n. s.) 404, 52 S. E. 821.) In *Springer v. City of Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, the court says: "If the fair market value of the property is as much immediately after the improvement as it was before the improvement was made, no damage has been sustained, and no recovery can be had." For cases from other jurisdictions than those quoted and cited from in this brief, laying down the same rule for measure of damages, see *Century Digest*, title "Municipal Corporations," section 395, and cases cited in notes.

California and Minnesota have constitutional provisions identical with our own. Furthermore, section 6068 of the Civil Code of Montana was taken, *verbatim*, from section 3333 of the Civil Code of California. Therefore, a determination of the highest court of the latter state upon this question should be conclusive. (See *Eachus v. Los Angeles Consolidated E. Ry. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149, 37 Pac. 750; *Nelson v. Village of West Duluth*, 55 Minn. 497, 57 N. W. 149; *Sallden v. City of Little Falls*, 102 Minn. 358, 120 Am. St. Rep. 635, 13 L. R. A. (n. s.) 790, 113 N. W. 884.)

*Messrs. Belden & De Kalb*, for Respondent, submitted a brief; *Mr. O. W. Belden* argued the cause orally.

The measure of damages adopted in this case has been held proper in a number of cases. (*City of Seattle v. Methodist Protestant Church*, 138 Fed. 307, 70 C. C. A. 597; *City of Chicago v. Jackson*, 196 Ill. 496, 63 N. E. 1013-1135; *Stroker v. St. Joseph*, 117 Mo. App. 350, 93 S. W. 860; *Graessle v. Car-*

*penter*, 70 Iowa, 166, 30 N. W. 392; *Lentz v. Carnegie*, 145 Pa. 612, 27 Am. St. Rep. 717, 23 Atl. 219; 2 Abbott on Municipal Corporations, p. 1936, sec. 814.) For a full and complete analysis of the rights and remedies of an injured party in cases of this kind where compensation was not first made, we refer the court to the case of *Blackwell, E. & S. W. Ry. Co. v. Bebout*, 19 Okl. 63, 14 Ann. Cas. 1145, 91 Pac. 877, and the note on the subject appended to the last citation. We contend that a recognition of the rule claimed by appellant to govern in cases of this kind needs very careful revision at the hands of the courts. It is unscientific in the extreme. It has been quite universally held in other classes of cases that a wrongdoer shall not be permitted to profit by the wrong done. Theoretically, because the grading of a street results in the saving to the property owner whose property abuts thereon of the cost of digging a basement does not, we contend, entitle the wrongdoer to offset that saving. That would be thrusting upon him a benefit which, perhaps, he did not desire. This alleged right has been denied in the following cases, and we think clearly on principle: *Pinney v. Winsted*, 83 Conn. 411, 76 Atl. 994 (in which it was said: "He cannot thrust benefits upon the land owner and then set up the benefits in reduction of the damage caused by these acts"); *Turner v. Rising Sun etc. Turnpike Co.*, 71 Ind. 547; *Baillio v. Burney*, 3 Rob. (La.) 317 (clearing of land); *Loomis v. Green*, 7 Me. 386 (improvement of an estate from the cutting of trees); *Leigh v. Garysburg Mfg. Co.*, 132 N. C. 167, 43 S. E. 632 (benefit to plaintiff's tenants not admissible in mitigation of an injury to his freehold); *Hurley v. Jones*, 165 Pa. St. 34, 30 Atl. 499 (improvement of a lot from filling it in).

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On May 11, 1914, the council of the city of Lewistown, Fergus county, under the provisions of the Act of the legislature entitled "An Act relating to special improvement districts in

cities and towns," *etc.*, approved March 14, 1913 (Laws 1913, Chap. 89), passed a resolution of intention to create a special improvement district for the purpose of excavating, filling and grading Janeaux Street, one of the principal streets of the city, and the intersections thereof (excluding the intersection of First Avenue and Janeaux Street), between the southwesterly boundary line of Sixth Avenue and the northeasterly boundary line of Dawes Street. After notice had been given as required by the Act, such proceedings were had that the district was created by resolution passed on June 8; it being designated as special improvement paving district No. 17. On July 1 a contract was let by the mayor and the city clerk, under the direction of the city council, to J. C. Maguire for the doing of the work in accordance with plans and specifications which had been prepared by the council, to conform to the grade as established by ordinance designated as Ordinance No. 293, enacted on June 14. The work was at once begun, and continued to completion on September 15. The plaintiff is the owner of lots 4, 5 and 6, and fractional lot 7, in block N-16, of the original town site of Lewistown, and fractional lot 3 of the Morase Addition thereto. Fractional lots 7 and 3 together constitute a lot of the same area as the other three. For present purposes, the three lots and the two fractional lots may be considered as four lots. They are each 50 feet in width by 90 feet in depth, and constitute a quadrangular area with a frontage on Janeaux Street of 200 feet, extending back to an alley running parallel with it through the block. The quadrangle is bounded on the northeasterly side by Fifth Avenue. Plaintiff's lots therefore lie between Fifth and Sixth Avenues. On the front of lot 4, facing Janeaux Street, is a brick building used as a plumber's shop. This extends several feet over on lot 5. On the rear of lot 4 there is a small residence which fronts on Fifth Avenue. On lot 6 there is also a small residence. There are no improvements on lot 7. Prior to the passage of the ordinance establishing the grade, Janeaux Street had followed the contour of the natural surface, except that in front of lot 7, and lots be-

tween it and Sixth Avenue, a narrow fill had been made by dumping waste material therein, in order to render more convenient the approach to Sixth Avenue to the southwest, the general level of which was about ten feet above that of all the plaintiff's lots. The change of grade effected by the ordinance, except as noted, was from the natural contour to a uniform grade from the intersection of Janeaux Street and Fifth Avenue, along the front of the entire block, to the intersection of the former with Sixth Avenue.

This action was brought to recover damages for injury claimed to have been caused to plaintiff's lots by the change of grade. It is alleged in the complaint:

"V. That between the eleventh day of May, A. D. 1914, and the fifth day of October, A. D. 1914, the defendant wrongfully and unlawfully, and without plaintiff's consent, and against his will, and without taking any steps whatsoever to have appraised, or to pay, the damages done to plaintiff's said property and accruing to plaintiff, and without any offer to pay plaintiff therefor, defendant caused the grade of Janeaux Street, upon which said lots fronted as aforesaid, to be greatly raised, changed, and altered, thereby placing the said property and the said buildings and permanent structures thereon far below the surface grade of said Janeaux Street, whereby plaintiff's property and said buildings and structures were and are permanently injured, damaged, rendered inaccessible, inconvenient, and undesirable for the purposes for which they were and are designed, and necessitating upon the part of the plaintiff a large expenditure of money and loss of time in placing the said buildings on the grade of said street and filling and adjusting the said lots to such grade, to plaintiff's damage in the sum of \$5,000."

In its answer the defendant admits that it caused the grade of Janeaux Street to be raised, changed and altered as alleged, but denies that plaintiff's property was thereby damaged in any amount whatever. As a special defense in bar of the action, the answer then sets forth all the proceedings resulting



in the creation of special improvement paving district No. 17. It then alleges, in substance, that the work was done under a contract let by the city to Maguire; that it was done strictly in accordance with the contract, to conform to the grade established by the ordinance; that the plaintiff wholly failed and neglected, during sixty days after the contract was let, to file a written claim for damages which would be caused to his said lots, as provided by section 13 of Chapter 89 of the Act referred to above; that by failure to file his claim within the time limited by the Act for that purpose he waived his right to claim damages; and that therefore his right to maintain the action is barred by the provisions of said section. On motion of plaintiff the court struck out all that portion of the special defense alleging waiver, leaving to be tried only the issues as to the fact of injury and the amount of damages to which plaintiff might be entitled. The plaintiff had verdict and judgment for \$2,500. The defendant has appealed from the judgment.

In their brief, counsel for plaintiff object to the consideration [1] of the appeal on the merits, and move for a dismissal of it on the ground that the record does not contain a copy of the judgment-roll, made up and certified as such. The record is substantially in the same form as was that before us in *Stokes v. Long*, 52 Mont. 470, 159 Pac. 28. In disposing of the second ground of the motion to dismiss the appeal in that case, we held that the record was sufficient to meet all the requirements of section 6799 of the Revised Codes. The motion is therefore denied.

The contention is made that the court erred in striking out [2] the latter portion of defendant's special defense. Section 13 of the Act is as follows: "At any time within sixty days from the date of the award of contract any owner or other person, having any interest in any lot or land liable to assessment, who claims that any of the previous acts or proceedings, relating to said improvements, are irregular, defective, erroneous, or faulty, or that his property will be damaged by the making of any of the improvements in the manner contemplated, may

file with the city clerk a written notice, specifying in what respect said acts or proceedings are irregular, defective, erroneous, or faulty, or in what manner and to what extent his property will be damaged by the making of said improvements. Said notice shall state that it is made in pursuance of this section. All objections to any act or proceeding or in relation to the making of said improvements, not made in writing, and in the manner and at the time aforesaid, and all claims for damages therefor, shall be waived by such property owner: Provided, the notice of the passage of the resolution of intention has been actually published and the notices of improvements posted, as provided in this Act."

By a reading of this Act, giving special attention to section 19, it becomes apparent that, so far as it relates to damages claimed by a property owner in an improvement district for injury to his property by a change of grade, the legislature had in view two purposes: (1) To debar such owner from any claim for compensation for damage to his property which he anticipates will be wrought by a proposed improvement, if he fails to ascertain the amount and extent of it, and to give notice in writing thereof to the council within the specified time; and (2) if notice is given, and he is awarded damages, to enable the council to add the amount of them to the cost of making the improvement when it comes to spread the assessment upon the property included in the district. It is not disclosed by anything in the record upon what theory the trial court struck out the portion of the special defense. Counsel for the plaintiff insist that its action can be upheld, either on the ground that section 13 is void as being repugnant to section 14 of Article III of the state Constitution, or that it is void, because violative of section 29 of the same Article of that instrument. The first of these provisions is: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." To uphold the court's action on this ground, counsel argue that this provision of the Constitution imposes

upon the agency of the state, which may be clothed with authority to take or damage private property for public use, the duty (a) to ascertain upon its own initiative what will be just compensation for the property to be taken or damaged in order that a particular public purpose may be served, and (b) to pay such compensation to the owner or tender it to him, before the taking or damaging occurs, and that section 13, *supra*, is clearly repugnant to it in imposing upon the owner who anticipates that his property will be damaged, the obligation to ascertain the amount of damages he will suffer and to make claim for it within the specified time at the peril of being altogether debarred from thereafter making any claim. Counsel for defendant contend that section 13 is merely a statute of limitations, and that, since it is within the power of the legislature to fix a limit within which an action may be brought upon any kind of claim, the section is not obnoxious to the objection made to it.

It must be conceded that the legislature is free to enact statutes of limitations because the Constitution does not deny it the power to do so. Such enactments may even be made to apply to causes of action already existing, provided only a reasonable time is fixed by the legislature in which parties may commence actions upon them before the statutory bar may be pleaded. (*Guiterman v. Wishon*, 21 Mont. 458, 54 Pac. 566.) If, however, we keep in mind the nature and object of statutes of limitation, it is apparent that the provision in question can-  
[3] not be classed as such. The principle upon which statutes of limitation are based is that they are statutes of repose; their object being to suppress stale and fraudulent claims after the evidence of their payment has been lost, or the facts concerning them have become obscure from lapse of time or the defective memory, or death, or removal of witnesses. (25 Cyc. 983; *Anaconda Min. Co. v. Saile*, 16 Mont. 8, 50 Am. St. Rep. 472, 39 Pac. 909.) Section 13, *supra*, does not fix a limit within which the property owner may bring his action, but merely raises a conclusive presumption that he has elected to waive any

damage he will suffer by the change of grade, if he fails to ascertain and notify the city authorities of the manner and extent of it. In this it is distinguishable from a statute of limitations, application of which depends upon whether the time within which a particular claim may be enforced by action has expired. It falls rather within the class of provisions similar to section 3289 of the Revised Codes. The purpose of this provision is to enable the city to examine the place where an injury occurs "by reason of any defect in any bridge, street, road," etc., to consult those who may be witnesses, and to have the opportunity to adjust and settle the claim and avoid litigation, if investigation discloses liability to make compensation. (*Tonn v. City of Helena*, 42 Mont. 127, 36 L. R. A. (n. s.) 1136, 111 Pac. 715.)

By many of the courts these provisions are classed as special statutes of limitation, in that the giving of the required notice is a preliminary step necessary to be taken to enforce the claim. (*Schmidt v. Fremont*, 76 Neb. 577, 97 N. W. 830; *Belkin v. Iowa Falls*, 122 Iowa, 430, 98 N. W. 296; *Van Auken v. City of Adrian*, 135 Mich. 534, 98 N. W. 15.) In our opinion, the better view is that the giving of the notice is of the essence of the right of action itself, without allegation and proof of which no recovery can be had. (*Dolenty v. Broadwater County*, 45 Mont. 261, 122 Pac. 919.) These remarks, however, are a digression remotely germane, if germane at all, to the real question at issue. The rule of construction applicable to the provision of the Constitution invoked is declared by the instrument itself. (Sec. 27, Art. III.) Expressed in terms clearly prohibitory, without words in itself or elsewhere in the Constitution expressly declaring it to be otherwise, it is a limitation denying to the legislature the power to authorize the taking or damaging of the property of the citizen without a fulfillment of the condition expressly imposed by it, viz.: "Without just compensation having been first made to or paid into court for the owner." (Art. III, sec. 14.) By adopting it the convention modified the rule of the common law, which

denied to the owner compensation for infringements upon his right of free access to his property by changes in the grade of the street upon which it abuts (*Less v. City of Butte*, 28 Mont. 27, 98 Am. St. Rep. 545, 61 L. R. A. 601, 72 Pac. 140), and secured to him the possession and enjoyment of it free from interference with it by any means for any public purpose, until just compensation has been ascertained and made or tendered to him. The making or tendering of compensation is thus made a condition precedent. On this subject this court said in *Flynn v. Beaverhead County*, 49 Mont. 347, 141 Pac. 673: "By force of this provision private property cannot be taken for a public use *in invitum*, except upon compensation first being made to the owner. In other words, the payment or tender of compensation, the amount of which has been ascertained in the manner provided by law, is made a condition precedent to the acquisition of any right by the public. \* \* \* Possession taken from the owner without compliance with this condition is wrongful, and ejectment will lie in favor of the owner to recover it. The fact that the wrongdoer is a municipal corporation does not affect the right to maintain the action." If the making of just compensation is a condition precedent, then it is beyond the power of the legislature to require the owner to do any act in order to secure what is guaranteed to him by the fundamental law.

When we come to examine the decisions of the courts of those states whose Constitutions contain provisions couched in the same or substantially the same terms as our own, we find them in hopeless conflict. For illustration: The courts of Ohio, Missouri and California uphold provisions of statute or city charters having the same purpose and effect as section 13, *supra*. (*Wabash R. R. Co. v. City of Defiance*, 52 Ohio St. 262, 40 N. E. 89; *Kansas City v. Duncan*, 135 Mo. 571, 37 S. W. 513; *Potter v. Ames*, 43 Cal. 75; *Sala v. Pasadena*, 162 Cal. 714, 124 Pac. 539.) The courts of other states interpreting the Constitution as imposing upon the agency of the state the obligation to first make compensation to the private owner, with much

more reason declare that the owner cannot be compensated by an opportunity afforded him to litigate for it, however long the time allowed him for that purpose. (*Levee Commrs. v. Dancy*, 65 Miss. 335, 3 South. 568; *Kincaid v. City of Seattle*, 74 Wash. 617, 134 Pac. 504, 135 Pac. 820; *Kime v. Cass County*, 71 Neb. 677, 8 Ann. Cas. 853, 99 N. W. 546, 101 N. W. 2.)

In *Levee Commrs. v. Dancy*, *supra*, the court said: "Obtaining by grant from the owner, or by adverse possession, long enough to bar his claim to the property, or condemning and paying for it, are the only modes of obtaining private property for public use in this state; and no Act which devolves on the owner the duty of initiating proceedings for compensation for his property, as the condition of his obtaining it, is allowable. He cannot be required to become an actor under the penalty of losing his property and 'due compensation' for it, if he shall not. He may enjoy his own, secure under constitutional guaranty, until an inquest by public authority determines that it is required for public use, and fixes the price to be paid him for the sale of it, and this price must be paid or tendered before his right can be divested, and a right to ask for compensation in three months or three years is not a valid substitute for the constitutional right to 'due compensation first being made.' The objection that the claim for compensation was not made in time is therefore not maintainable."

In *Kime v. Cass County*, *supra*, the court on this subject made use of the following very terse language: "If the legislature could rightly require of the land owner one affirmative and initiatory act as a condition precedent to obtaining damages, they might require of him any other, or a series of acts which might be difficult or onerous, or in some circumstances impossible of performance, and so the constitutional guaranty might thus be seriously impaired, or wholly frittered away. We are of opinion that the spirit, if not the letter, of the Constitution, requires that the public, seeking to appropriate private property to its use, should, unless damages have been waived by some affirmative and unequivocal act, take steps of its own

motion to ascertain their amount and secure their payment, and that mere passive acquiescence by an individual in the appropriation of property, unaccompanied by any conduct indicative of affirmative assent thereto, should not, unless continued for the statutory period of limitations, be regarded as a waiver of his rights."

Mr. Lewis, in his work on Eminent Domain (third edition, section 676), states his views thus: "These [constitutional] provisions are imperative, and any law which violates them is incapable of enforcement. \* \* \* The same rule applies to a taking by municipal corporations as to others."

The foregoing cases, except *Kincaid v. City of Seattle*, had under consideration the taking of property for public use, and not consequential injury caused by the change of grade in a street by order of the municipality. Yet, as pointed out in that case, they logically hold that a statute which requires the owner, whether his property is about to be taken or damaged, to initiate his right to compensation by affirmative act, is violative of the guaranty declared by the section of the Constitution, *supra*. We agree with this view, and therefore hold that the court properly struck out the part of the pleading setting up the bar of the statute.

Since this conclusion disposes of this branch of the case, we shall not examine the question whether the section of the statute in question is also violative of the other provision of the Constitution which guarantees due process of law.

At the trial plaintiff introduced evidence to show what it [4] would cost to fill the lots and raise the buildings to the grade of Janeaux Street as established by the ordinance, including the construction of retaining walls along the alley in the rear and along the boundary line between lot 7 and the one adjoining it toward Sixth Avenue, and then rested. Counsel for defendant interposed an objection that it was incompetent and immaterial, because it did not tend to establish the correct measure of damages, because it did not tend to show that the market value of the property was diminished by the change

of grade, and because it was not accompanied by other evidence tending to show that the filling of the lots and raising of the buildings would restore them to the same relative position with respect to the present grade of Janeaux Street as they occupied with respect to the grade of that street before the change was made. The court overruled the objection. Counsel for defendant entertained the view that the correct standard of damages is the difference between the fair market value of the property before and after the change in the grade had been effected, less the amount of benefits accruing to it by reason of the improvements. They called witnesses and offered to show by them that according to this standard of measurement plaintiff's property had not been damaged to any extent. The court held that the evidence sought was incompetent and immaterial, and refused to permit counsel to examine the witnesses. The real inquiry presented by the contentions of counsel, therefore, is whether the court heard and submitted the case to the jury upon the correct theory of damages.

The general rule by which damages to real estate are to be measured is stated by Mr. Sedgwick as follows: "The general principle upon which compensation for injuries to real property is given is that the plaintiff should be reimbursed to the extent of the injury to the property. The injury caused by the defendant may be of a permanent nature; in such a case the measure of damages is the diminution in the market value of the property. \* \* \* If the injury is easily reparable, the cost of repairing may be recovered. But it must be shown that the repairs were reasonable; and if the cost of repairing the injury is greater than the diminution in market value of the land, the latter is always the true measure of damages. Strictly speaking, therefore, the cost of repairs is not the measure of damages, but only evidence of the amount of damages." (3 Sedgwick on Damages, sec. 932.)

In 38 Cyc., at pages 1126 and 1127, the rule is stated thus: "The difference in the value of land before and after the trespass is the general rule as to the measure of damages for an



injury to the land itself, and this means the difference in value of the entire tract, not merely the ground at the exact place of injury. But where the land can be restored to its former condition at a cost less than the diminution in value, if it is not restored, the cost of restoration, plus compensation for loss of time, is frequently laid down as the measure of damages. However, the application of this principle is confined to cases where the cost of restoration is less than the difference in the value of the land before and after the trespass, and, of course, it is limited to cases where cost of restoring the specific land is less than the value of the land. Evidence of cost of restoration is admissible only to reduce, not to increase, the damages above the diminution in value of the land resulting from the trespass."

In Volume 28 of the same work, at pages 1074-1076, we find this statement of the measure of damages for changes of grade and the like: "The general rule as to the measure of damage, whether for a change of grade, street opening, or other improvement, is that it consists of the difference in the value of the property affected immediately before and immediately after the making of the improvement, allowance being made for the particular use to which the property is adapted, and for direct benefit it has received by reason of the improvement. \* \* \*

Where the rule is adopted that the measure of damages is the change in market value, specific items of injury can be considered only in determining the difference in market value, not as the basis of specific awards of damages. An abutting owner has no right to damages for a change of grade, where the property is left as convenient of access as before and there is no depreciation in its market value, or in case the market value of the property, including the use to which it may be devoted, will be enhanced." Again, on pages 1079 and 1080: "If the particular property is benefited as much as damaged, there can be no recovery, and benefits accruing to property by reason of the improvement may be set off against damages, if such benefits are special, and not in common with those resulting to property

in general; but, where an abutting owner is assessed for the cost of the improvement, the only benefit that can be set off is that which is in excess of the assessment levied against him."

In their work on Taxation and Assessment (Volume 2, section 661), Page & Jones state the rule in this language: "If, by reason of a public improvement, injury is caused to private property for which the public corporation constructing the improvement is liable in damages, the measure of damages is the difference between the market value of the property as it was before the alteration and as it was immediately afterwards, subject to deduction for special benefits caused by such improvements."

In McQuillin on Municipal Corporations, Volume 4, section 1991, the author says: "The measure of damages resulting to property from the change of grade of a street, or other public improvement, is the difference between the fair market value of the property just before the work was done and such value thereafter, less any special benefit and advantage thereto resulting from the improvement."

The rule thus stated in varying terms is recognized by the courts generally. (*Sweeney v. Montana C. Ry. Co.*, 25 Mont. 543, 65 Pac. 912; *Enid & A. Ry. Co. v. Wiley*, 14 Okl. 310, 78 Pac. 96; *Hartshorn v. Chaddock*, 135 N. Y. 117, 17 L. R. A. 426, 31 N. E. 997; *Pedelty v. Wisconsin Zinc Co.*, 148 Wis. 245, 134 N. W. 356; *Smith v. City of Kansas City*, 128 Mo. 23, 30 S. W. 314; *Stroker v. City of St. Joseph*, 117 Mo. App. 350, 93 S. W. 860.) Tested by the rule laid down in these authorities, the evidence showing the cost of restoration was competent and material. In *Hartshorn v. Chaddock*, *supra*, the New York court held that, in the absence of evidence introduced by either party showing the effect of the injury upon the market value, evidence showing the cost of restoration was sufficient to sustain an award of damages. The evidence offered by the defendant, tending to show the market value before and after the installment of the improvement, was also competent, and in excluding it the court was in error. Defendant was clearly entitled to

show if it could, that the value of plaintiff's property was actually enhanced by the improvement, and that he was not entitled to recover anything. In case it could not show this, it was nevertheless entitled to show by the evidence, so far as it had value for that purpose, that the diminution in value was less than the cost of restoration. The court would not otherwise be in a position to submit the case to the jury in such a way as to enable them to ascertain and declare what compensation, if any, the plaintiff was entitled to. For this error the defendant is entitled to a new trial.

Throughout the trial counsel for the plaintiff assumed the [5] position that the complaint was so formulated as to tender issue solely upon the cost of restoration of the property, and hence that the evidence of the market value of the property offered by defendant was incompetent, because it was without this issue. There is no merit in this contention. The allegations of the paragraph quoted *supra* may be criticised on the ground of indefiniteness, but they are broad enough to permit the introduction of evidence on any theory of the measure of damages. Hence defendant, under the denials of its answer, was entitled to introduce any evidence that would tend to show that plaintiff's property had not been injured or that the damage was less than claimed by him.

Counsel for plaintiff insist that, since no formal offer of proof [6] was made by defendant disclosing what the witnesses would have testified respecting the difference in the market value of the property before and after the change in the grade was made, this court cannot determine whether the trial court erred in refusing to allow counsel for defendant to question them. It is the general rule that when counsel desires to preserve for review a ruling which sustains an objection to a question put to a witness, he must show by an offer of proof what the answer to the question would have been. (*Zvanovich v. Gagnon Co.*, 45 Mont. 180, 122 Pac. 272.) This rule does not apply, however, when the question itself indicates what evidence was sought to be brought out by it; nor does it apply

to a ruling the effect of which is to exclude all evidence on a given subject, on the mistaken notion that it is not within the issues made by the pleadings. Under such circumstances, an offer of proof is not necessary.

Contention is made that the court erred in refusing to submit certain instructions requested by the defendant. What has already been said disposes of the contentions made in this behalf, and will be sufficient to guide the court on another trial.

The judgment is reversed, and the cause remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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STILLWELL, RESPONDENT, v. RANKIN, APPELLANT.

(No. 4,054.)

(Submitted June 14, 1918. Decided June 28, 1918.)

[174 Pac. 186.]

*Contracts—Rescission—Cancellation of Instruments—Negotiable Promissory Notes—Fraud—Complaint—Injunction Pendente Lite—Evidence—Discretion.*

Contracts—Fraud—Damage—Complaint—Sufficiency.

1. To state a cause of action for rescission of a contract for fraud, plaintiff need not allege that he suffered pecuniary loss, the statement that he suffered damage or injury being sufficient.

Same.

2. Allegations that plaintiff was induced by defendant's fraudulent representations to assume obligations which otherwise he would not have assumed and to purchase property he would not have bought but for such representations, were sufficient to disclose damage within the meaning of paragraph 1 above.

Same—Fraud—Material Facts.

3. To constitute actionable fraud, the representations relied upon for rescission of a contract must relate to material facts.

Same—What may Constitute "Material Facts."

4. Representations made to a stockholder in a company by a broker that 100 shares of its capital stock had been turned back into its treasury by a subscriber unable to pay therefor and soliciting plaintiff to buy it "to help the company out," held to have

related to a material matter within the meaning of section 4978, defining fraud.

Same—Promissory Notes—Transfer—Injunction *Pendente Lite*—Evidence.

5. The fact that defendant's evidence contradicted the allegations of the complaint, which was verified positively and thus had the effect of an affidavit, did not deprive the district court of power to grant an injunction restraining defendant from transferring promissory notes pending suit for their cancellation for fraud.

Promissory Notes—Transfer—Injunction *Pendente Lite*—Discretion.

6. Courts of equity are inclined to be liberal in restraining *pendente lite* the transfer of negotiable promissory notes alleged to have been procured by fraud, when such transfer will defeat the right of the makers to interpose their defense as against holders in due course.

[As to stockholders' subscriptions as affected by fraud, see note in 3 Am. St. Rep. 824.]

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by James L. Stillwell against A. L. Rankin. From an order granting an injunction *pendente lite*, defendant appeals. Affirmed.

Mr. C. A. Spaulding, for Appellant, submitted a brief, as well as one in reply to that of Respondent, and argued the cause orally.

Unless the complaint states a cause of action, the order of the court below enjoining the transfer or assignment of the notes in question can find no justification. Injunction is only authorized, under our statute, upon the filing of a complaint setting forth adequate grounds for injunctive relief. There is no allegation in the complaint that the stock to be delivered is not worth the full amount of the notes; hence, even if the notes were negotiated and respondent was obliged to pay them, he does not show that he would suffer any damage. Without such an allegation the complaint is fatally defective, for it is elementary that equity will not interpose if no wrong is about to be perpetrated or damage suffered. Indeed, so far as that is concerned, there can be no actionable fraud unless it results in damage to someone. (*Carpenter Paper Co. v. News Pub. Co.*, 63 Neb. 59, 87 N. W. 1050; *Power & Bro. v. Turner*, 37

Mont. 521, 97 Pac. 950; *Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *Shoudy v. Reeser*, 48 Mont. 579, 142 Pac. 205; *Taylor v. Guest*, 58 N. Y. 262; *Pforzheimer v. Selkirk*, 71 Mich. 600, 40 N. W. 12; *Southern Development Co. v. Silva*, 125 U. S. 247, 31 L. Ed. 678, 8 Sup. Ct. Rep. 881; *Morrison v. Lods*, 39 Cal. 381; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Gerner v. Yates*, 61 Neb. 100, 84 N. W. 596.)

Where, on the return on an order to show cause why an injunction *pendente lite* should not issue, the defendant appears and controverts the allegations of plaintiff's complaint, and plaintiff offers no evidence other than such complaint, as was done in this case, the injunction must be denied. (*Rea Brothers Sheep Co. v. Rudi*, 46 Mont. 149, 127 Pac. 85.)

Regardless of the foregoing, and upon the merits as disclosed upon the hearing on the order to show cause, it was an abuse of discretion for the court below to continue this injunction *pendente lite*. Fundamental rules relating to the law of injunctions required the court below to deny the application. (See *Campbell v. Flannery*, 29 Mont. 246, 248, 74 Pac. 450.)

But if the complaint did allege actionable fraud, respondent has a plain, speedy and adequate remedy at law (Spelling on Injunction, sec. 13) by way of an action for damages.

*Messrs. Freeman & Thelen*, for Respondent, submitted a brief; *Mr. James W. Freeman* argued the cause orally.

The cases of *Newhall v. Enterprise Min. Co.*, 205 Mass. 585, 137 Am. St. Rep. 461, 91 N. E. 905; *Davis v. Foreman*, 229 Mo. 27, 129 S. W. 213; *McDoel v. Ohio etc. Co.* (Ky.), 36 S. W. 175; *Ogden Valley T. & R. Co. v. Lewis*, 41 Utah, 183, 125 Pac. 687, hold that, when a vendor of stock represents to the vendee, as an inducement to enter into a contract, he will sell him stock of a certain kind, either stock that belongs to other people or stock that is in the treasury of the company, the purchaser is entitled to receive the stock represented to be sold and not compelled to take any other; and that if the vendor then offers to deliver stock which he has himself or which is not treasury

stock, and which is not in the possession of the corporation, the vendee has a right to rescind the contract on the grounds of false and fraudulent representation, in order to avoid liability on the contract. (See, also, *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1014; *Stern v. Kerby Lumber Co.*, 134 Fed. 509; *Harlow v. La Brum*, 151 N. Y. 278, 45 N. E. 859.)

In an action praying for an injunction *pendente lite*, the equitable principles applicable to an injunction *pendente lite* and to mandatory injunction are not in common, and the courts are more liberal in granting the former than the latter. (Note in 38 L. R. A. (n. s.) 228.) Under *Rea Bros. Sheep Co. v. Rudi*, 46 Mont. 149, 159, 127 Pac. 85, the trial court has the discretionary power to grant an injunction *pendente lite*, when it is left doubtful whether the plaintiff will suffer irreparable injury before his rights are fully determined and investigated. (*Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 22 L. R. A. 496, 57 N. W. 559.)

If the maker of a note has good grounds for avoiding the note as against the payee, and which he is taking advantage of by his legal remedies, but which are of such a nature that as against a subsequent purchaser for value before maturity they are no defense, and is deprived of his defenses as to the notes during the litigation by the negotiation of them, is he not irreparably injured, especially when there are some doubts as to the appellant's solvency? (*Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241; *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777.) In the case of *Currie v. Jones*, 138 N. C. 189, 50 S. E. 560, it was stated: "In a suit to recover shares of stock in a corporation, injunctive relief against the defendant's disposal of the shares being more beneficial and complete than any relief available at law, is more readily granted than in the case of ordinary personal property." And what is true about negotiable stocks should be more true about negotiable notes. (*Wilcox v. Ryals*, 110 Ga. 287, 34 S. E. 575; *Atkinson v. Cain*, 61 W. Va. 355, 123 Am. St. Rep. 984, 56 S. E. 519; *Thurman v. Burt*, 53 Ill.

129; *Bridges v. Robinson*, 2 Tenn. Ch. 720; *Johnson v. Powell*, 34 Tex. 528; 1 Spelling on Injunctions, p. 86.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was brought to secure the rescission of a contract for the purchase of certain shares of stock of the State Life Insurance Company of Great Falls; to secure the cancellation of three promissory notes representing the purchase price, and, by way of ancillary relief, to secure an injunction restraining the defendant from transferring the notes pending the litigation. After a hearing upon the return of an order to show cause, an injunction *pendente lite* was issued and defendant appealed from the order. Three principal questions are presented:

1. It is urged that the complaint does not state a cause of action because (a) it does not allege that plaintiff has suffered pecuniary loss, and (b) it does not disclose that the alleged misrepresentations concerned *material* facts.

(a) Is it essential to the statement of a cause of action for [1] rescission of a contract for fraud that the plaintiff allege that he has suffered pecuniary loss? Authorities may be found which answer in the affirmative and most emphatically, but curiously enough do not insist that the amount of such loss is material, if it is at all appreciable. In 2 Pomeroy's Equity Jurisprudence, section 898, it is said: "Fraud without resulting pecuniary loss is not a ground for the exercise of remedial jurisdiction, equitable or legal. \* \* \* If any pecuniary loss is shown to have resulted, the court will not inquire into the extent of the injury; it is sufficient if the party misled has been very slightly prejudiced, if the amount is at all appreciable." We do not feel called upon to follow this text.

It is axiomatic in the law that, if it is necessary to allege a particular fact, it is equally necessary to prove it, if the allegation is put in issue. It certainly could not be said that it would be sufficient for plaintiff to allege that as a result of the fraud



he suffered damage "in an appreciable amount" or suffered "material damage" or "substantial damage." Any one of these allegations would render the pleading subject to demurrer under section 6534 of our Codes. If it is necessary to allege pecuniary loss, it is necessary to allege the amount of such loss; but section 6532, Revised Codes, provides, "if the recovery of money or damages be demanded, the amount must be stated," and this provision is exclusive. "*Expressio unius est exclusio alterius.*" This is not an action for the recovery of money or damages, and therefore it is not necessary to allege that plaintiff suffered pecuniary loss.

Courts of equity, like courts of law, however, do not concern themselves with wrongs which do not produce injury; but "injury" and "pecuniary loss" are not synonymous terms. In *Shoudy v. Reeser*, 48 Mont. 579, 142 Pac. 205, this court stated the rule that, to make out a case of actual fraud, it is necessary for plaintiff to allege: (1) That defendant made representations with the intent that they should be relied upon; (2) that they were false; (3) that they were accepted as true and plaintiff was induced to act upon them; and (4) that by reason of the fraud plaintiff suffered damage. These are the elements recognized by the authorities generally. Most of the courts and text-writers employ the term "damage" in the sense of injury; a few restrict its meaning to financial loss. We prefer to adhere to the rule which gives to the term its broader significance, as including either pecuniary loss or the alteration of one's position to his prejudice. Fraud may result in injury which cannot be measured in dollars and cents. Indeed, if the rule for which appellant contends be accepted, then insolvency of the defendant alone determines the jurisdictional question, for it is inconceivable that any injury which can be measured by a money standard cannot be redressed by an action at law if the guilty party is financially responsible. But insolvency is not the sole determining factor in suits of this character, and upon this the authorities are generally agreed.

If the allegations of this complaint are true, plaintiff was induced by fraudulent representations to assume obligations which otherwise he would not have assumed and to purchase property which otherwise he would not have purchased. We deem the allegations sufficient to disclose damage within the meaning of that term which we adopt.

(b) It is elementary that, to constitute actionable fraud, the [3, 4] representations must relate to material facts, and this upon the theory that "the law disregards trifles." (Sec. 6201, Rev. Codes.) It is alleged that in August, 1916, defendant and H. L. Moore, knowing that plaintiff was a stockholder in the State Life Insurance Company of Great Falls, and representing that defendant was "the head man" of the company, stated to plaintiff that 100 shares of the stock had been turned back to the company by a subscriber who was unable to pay for it, and solicited plaintiff to purchase the stock "to help the said company out," knowing that plaintiff understood that he was asked to purchase treasury stock; that these representations were false and known by defendant to be false; that they were made with the purpose of defrauding plaintiff; that they were relied upon by him; that in reliance thereon he agreed to purchase the stock (which otherwise he would not have purchased) and gave the notes in controversy. Do these representations refer to material facts within the meaning of section 4978, Revised Codes, defining fraud? There is no hard-and-fast rule for determining this question. Every case must be decided upon its own peculiar facts and circumstances. It is conceivable that a stranger to the company who had ready money seeking investment would decline to purchase its stock even though it might appear to be a profitable venture. It is likewise conceivable that a stockholder in the company, seeking further investments, would refuse to purchase more stock in the same company, even though he knew it was prosperous and gave promise of liberal returns in dividends. He might reasonably prefer to distribute his investments. We think it equally consonant with reason and business experience that a stockholder might assume bur-

densome obligations to purchase treasury stock of his company in order to increase its working capital, promote its opportunities for extended operations, stabilize the value of his own outstanding stock, or enhance the chances of better returns by way of increased dividends, when he would be altogether unwilling to purchase privately owned stock at the same price. He might be willing to relieve his company of embarrassment or himself of the possibility of loss upon the stock already owned, but unwilling to relieve a stranger from the embarrassment consequent upon his having contracted for stock in the same company. In any event, a man is entitled to receive the property he contracts to purchase and cannot be required to accept in lieu thereof something else, even though it has equal value. (*Newhall v. Enterprise Min. Co.*, 205 Mass. 585, 137 Am. St. Rep. 461, 91 N. E. 905.) We think these representations concern material facts and that, if made and if the other elements of fraud are present, they furnish sufficient basis for rescission. (1 Cook on Stock and Stockholders, 7th ed., sec. 145; *Ogden Valley T. & R. Co. v. Lewis*, 41 Utah, 183, 125 Pac. 687.)

2. Appellant contends that every material allegation of the [5] complaint was put in issue by defendant's testimony, and therefore an injunction should not have been granted. In support of his position, he invokes the rule announced in 22 Cyc. 945, 946, and recognized by this court in *Rea Bros. Sheep Co. v. Rudi*, 46 Mont. 149, 127 Pac. 85, to the effect that if, in response to an order to show cause, the defendant puts in issue all the material allegations of the complaint and plaintiff fails to offer evidence in support, the court will generally deny the injunction. But that rule is not an absolute one. The same authority proceeds: "But notwithstanding positive denials under oath in the answer, the court has discretion to grant a preliminary injunction and it will not be denied as of course."

The complaint in this instance was verified positively and not upon information and belief. It was offered in evidence upon the hearing and had the effect of an affidavit. (22 Cyc. 941.)

In so far as the evidence tendered by defendant contradicted the allegations of the complaint, it raised an issue as to the credibility of the plaintiff on the one hand and defendant on the other; for the only evidence produced by defendant material to this inquiry was furnished by his own testimony. He introduced the testimony of Jas. B. Walsh, F. E. Beatty, and himself. The testimony of Walsh and Beatty tended to show that Walsh had subscribed for 100 shares of the capital stock of this company at \$15 per share, had given his notes to represent the purchase price, and had not paid the notes nor the interest on them; that all the capital stock of the company had been sold in 1913, and none of it had ever been turned back to the company; that defendant, acting in the capacity of a broker, was seeking to resell Walsh's stock for commission in amount equal to the difference between what Walsh owed the company (about \$2,200) and whatever he could realize on a resale (in this instance \$3,000); and that the company was not interested in the resale of this stock. The defendant testified that it was the Walsh stock which he intended to deliver to plaintiff and which he had in mind when the contract with plaintiff was executed. He denied that he represented that he was offering for sale treasury stock or solicited plaintiff to help out the company. We refrain from commenting upon the remainder of his testimony. The trial court occupied the more advantageous position, in that the witness was present in person, and his demeanor on the stand, his apparent candor or lack of it, and all the other elements which enter into the determination of his credibility, were open to scrutiny.

3. It is contended that, in any event, the court abused its [6] discretion in granting the injunction; but with this we are unable to agree. Courts of equity are inclined to be liberal in restraining *pendente lite* the transfer of negotiable promissory notes alleged to have been procured by fraud, when such transfer will defeat the right of the makers to interpose their defense as against holders in due course. (2 High on Injunctions, sec. 1126; Bispham's Principles of Equity, sec. 459; Os-

*born v. United States*, 9 Wheat. 738, 6 L. Ed. 204; 22 Cyc. 840.)

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

Motion for rehearing denied October 21, 1918.

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MARKINOVICH, RESPONDENT, v. NORTHERN PACIFIC  
RY. CO. ET AL., APPELLANTS.

(No. 3,919.)

(Submitted June 17, 1918. Decided July 1, 1918.)

[174 Pac. 183.]

*Personal Injuries—Master and Servant—Insufficient Number  
of Employees—Burden of Proof—Proximate Cause—Failure  
of Proof—Erroneous Instruction.*

Personal Injuries—Master and Servant—Insufficient Number of Em-  
ployees—Burden of Proof.

1. In an action by a laborer against his employer for negligent failure to detail a sufficient number of men to move a heavy plate, resulting in its fall and plaintiff's injury, the burden was upon the latter to show that the negligence alleged was the proximate cause of his injury.

[As to proximate and remote causes of injury from negligence, see notes in 50 Am. Rep. 569; 36 Am. St. Rep. 807.]

Same—Proximate Cause—Failure of Proof.

2. Plaintiff, a laborer, with four others, was directed to move a steel plate weighing 600 pounds, three being in front with their backs to it and plaintiff and another behind, facing it; in going up a slight incline, the men behind failed to push it forward; the plate slipped out of the hands of the men in front and injured plaintiff. The evidence showed that the plate was not too heavy for five men to carry. *Held*, that the proximate cause of the injury was not the excessive weight of the plate—as charged by plaintiff—but the clumsy method in handling it employed by him and his coemployees.

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As to duty of master to provide sufficient help, see notes in 48 L. E. A. 392; 17 L. E. A. (n. s.) 773; 40 L. E. A. (n. s.) 913.

On liability of master for failure of foreman to designate enough hands to perform work, see note in 40 L. E. A. (n. s.) 918.

Same—Manner of Doing Work—Master's Liability.

3. The master is not responsible for injuries to his servants which result proximately from the manner in which they perform a task allotted to them, this being a matter of detail which he may rightly leave to their judgment and discretion.

Same—Master not Insurer—Erroneous Instruction.

4. An unqualified instruction that it was the duty of defendant to provide sufficient number of men to perform the task in hand was erroneous, as constituting the master an absolute insurer of the safety of his servant.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Robert Markinovich against the Northern Pacific Railway Company, a corporation, and J. L. Wester. From a judgment for plaintiff, and an order denying their motion for new trial, defendants appeal. Reversed, and cause remanded with directions to enter judgment for defendants.

*Messrs. Gunn, Rasch & Hall and Messrs. Walker & Walker*, for Appellants, submitted a brief; *Mr. Carl Rasch* argued the cause orally.

It stands admitted and conceded upon the record that an ample force had been provided for the doing of the work and of every detail thereof, and if by inadvertence or mistake of judgment the foreman in this instance failed to assign a sufficient number of men to carry the plate, it was not negligence for which the defendant company could be held responsible. (4 Labatt on Master & Servant, par. 1528; *Dair v. New York etc. Steamship Co.*, 204 N. Y. 341, 40 L. R. A. (n. s.) 918, 97 N. E. 711; *Worlds v. Georgia R. Co.*, 99 Ga. 283, 25 S. E. 646; *Hilton v. Fitchburg R. Co.*, 73 N. H. 116, 68 L. R. A. 428, 59 Atl. 625; *Dill v. Marmon*, 164 Ind. 507, 69 L. R. A. 163, 73 N. E. 67.) If the plate was, as a matter of fact, too heavy for safe handling by the men assigned, and the plaintiff was injured by reason of that fact, responsibility for his misfortune cannot be imputed to the employer. All the cases so hold practically without a dissent. (*Stenvog v. Minnesota Transfer Ry. Co.*, 108 Minn. 199, 17 Ann. Cas. 240, 25 L. R. A. (n. s.) 362,

121 N. W. 903; *International etc. Ry. Co. v. Figures*, 40 Tex. Civ. 255, 89 S. W. 780; *Haviland v. Kansas City etc. R. Co.*, 172 Mo. 106, 72 S. W. 515; *Haywood v. Galveston etc. Ry. Co.*, 38 Tex. Civ. 101, 85 S. W. 433; *Walsh v. St. Paul etc. Ry. Co.*, 27 Minn. 367, 8 N. W. 145; *Sainis v. N. P. Ry. Co.*, 87 Wash. 18, 151 Pac. 93.)

The legal duty of the defendants did not impose upon them the obligation to exercise any higher degree of care for the safety of the plaintiff and his coworkers under the circumstances than the plaintiff and his associates were using themselves. As it was the duty of the plaintiff to take appropriate care of himself for his own safety, and not to expose himself to unnecessary risk or danger, the defendants had a right to assume that he would do so, and they were justified to act on that assumption. (*Dunlap v. Barnaby Mfg. Co.*, 148 Mass. 51, 18 N. E. 599; *Way v. Chicago etc. Ry. Co.*, 76 Iowa, 393, 41 N. W. 51; *White v. Owosso Sugar Co.*, 149 Mich. 473, 112 N. W. 1125; *Turner v. Missouri etc. R. Co.*, 45 Tex. Civ. 650, 119 S. W. 719.)

*Messrs. William and Harry Meyer*, for Respondent, submitted a brief; the former argued the cause orally.

The question whether or not a sufficient number of men had been employed and were adequate for the work to be performed, and whether or not the plaintiff, under the circumstances as shown in this case, was guilty of contributory negligence or assumed the risk, was for the jury. (*Coughlan v. Philadelphia, B. & W. Ry. Co.*, 6 Penne. (Del.) 242, 67 Atl. 149; *Louisville & N. R. Co. v. Shelburne* (Ky.), 117 S. W. 303; *Bokamp v. C. & A. Ry. Co.*, 123 Mo. App. 270, 100 S. W. 689; *Peterson v. American Grass Twine Co.*, 90 Minn. 343, 96 N. W. 913; *Sulzberger & Sons v. Hoover* (Okl.), 149 Pac. 887; *Suniga v. Atchison etc. Ry. Co.*, 94 Kan. 201, 146 Pac. 364; *Central etc. Gas. Co. v. Salyer*, 164 Ky. 718, 176 S. W. 183; *Texas Power & Light Co. v. Burger* (Tex. Civ.), 166 S. W. 680; *James S. Kub & Co. v. Jajko*, 224 Ill. 338, 79 N. E. 577;

*Graham v. Dillon (Fitter v. Iowa Tel. Co.)*, 144 Iowa, 82, 121 N. W. 48; *St. Louis etc. Co. v. Gennings*, 114 Ark. 574, 170 S. W. 90; *Titus v. Anaconda C. M. Co.*, 47 Mont. 583, 133 Pac. 677; *Pascoe v. Nelson & Peterson*, 52 Mont. 405, 158 Pac. 317.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1914, the Northern Pacific Railway Company was engaged in constructing a passageway under its tracks in the yard at Glendive. In the course of the work it became necessary to move an iron or steel plate a distance estimated at from 100 to 200 feet, and to place it in position for use. The plate was about forty-four inches square, something more than an inch in thickness, and weighed 600 pounds, or thereabouts. Wester, the foreman in charge, detailed five men, including plaintiff, to do the work. After the plate had been carried about fifty feet, the men in front let their end fall, with the result that plaintiff—one of the two men carrying the rear end—received a blow in the abdomen which caused the injury of which he complains. He brought this action to recover damages from the railway company and the foreman, and charged them with negligence in failing to detail a sufficient number of men to perform the task properly. He prevailed in the lower court, and defendants appealed from the judgment and from an order denying their motion for a new trial.

1. There is a sharp conflict in the evidence throughout, but [1, 2] for present purposes we have adopted plaintiff's theory generally. Our labors are greatly simplified by the frank statement of plaintiff's counsel, in their brief, to the effect that the evidence offered by plaintiff establishes that the weight was not too great for him, that he could have sustained it, that he did not know at the time he received the injury that it was too heavy for the five men, and "that the injury was caused by the weight slipping out of the hands of two or three of the men on the other side of the place, and was due to their fault alone." These conclusions from the evidence, except the last one, are not



merely justified, but are commanded. The evidence in effect is that, when the five men reached the plate, three of them seized it by the front end, with their backs to the plate and their hands behind them, the edge of the plate resting in the palms of their hands; that plaintiff and Bosick took hold of the edge of the rear end, their faces toward it and their hands in front of them; that in this manner they carried the plate about fifty feet, until they started up a slight incline, when, the two men behind failing to push forward on the plate, it slipped out of the hands of the three in front, and the front end fell to the ground.

Appellants contend that upon this testimony plaintiff should be held to have assumed the risk. If it were necessary to dispose of this contention in order to determine the controversy, we should be inclined to say that the facts of this case bring it within the general rule adverted to in *Sorenson v. Northern Pac. Ry. Co.*, 53 Mont. 268, 163 Pac. 560, and not within the exception applied in that case; but our view of the evidence renders it unnecessary to consider the question of assumption of risk.

It is a serious question whether the evidence is sufficient to establish negligence, even under the rule of absolute liability, erroneously adopted by the trial court. There is not a suggestion in the record, or an inference that can be drawn from it, that, if six or seven men had been engaged upon the task, the same result would not have happened, if they arranged themselves about the plate in the same general manner that these five men did. There were many other employees of the company present, but not one of these five men complained that the burden was too great for the number of men assigned to carry it. The plate was moved by them fifty feet or more without apparent difficulty, and no request for assistance was made. Plaintiff and one other man carried the rear end, and plaintiff did not know that the burden was too great. But if we assume that in point of fact the burden was too great for the number of men assigned to carry it, and that under the rule announced by the court the defendants were negligent, still the burden

was upon the plaintiff to show that such negligence was the proximate cause of his injury, and in this respect he failed. His injury did not result from strain or overexertion, but from the fact that the three men in front allowed their end of the plate to fall. It is apparent, then, that whatever caused the fall was the proximate cause of the injury; but neither plaintiff nor any one of his witnesses testified that the excessive weight of the plate caused the fall, and there are not any facts disclosed from which such an inference can be drawn. There is but one conclusion deducible from the plaintiff's case, *viz.*, that the great weight was not the cause of the fall, but that the plate fell as the result of the clumsy method employed by the men in handling it and the failure of plaintiff and Bosick to keep it forward sufficiently to prevent it slipping from the hands of the three men in front. The manner in which the men should [3] carry the plate—their arrangement of themselves about it—was a mere detail of their work which the master was justified in leaving to their own judgment and discretion.

It is elementary that the master is not responsible for an injury to his servant which results proximately from the manner in which the servants do their work. He is not required to supervise the disposition of his working force in carrying out the details of the employment, any more than he is required to direct the workmen in the use of simple tools and appliances. (4 Labatt on Master & Servant, sec. 1528.) The trial court should have directed a verdict for the defendants, as it was requested to do.

2. In passing, we call attention to instruction No. 3, given, [4] as follows: "You are instructed that in this case it was the duty of the defendant Northern Pacific Railway Company to provide a sufficient number of servants to perform the work of lifting and carrying the iron plate in question with reasonable safety."

The rule which measures the master's duty has been stated and restated so often that it would seem impossible that any controversy over it could arise at this late date. He is required to exercise reasonable care to furnish a reasonably safe place

for work, reasonably safe appliances, reasonably competent fellow-servants, etc. As applied to the facts of this particular case, the utmost that the law exacted of these defendants was that they exercise reasonable care to provide a sufficient number of men to move this plate with reasonable safety. *Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669, *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701, *Kallio v. Northwestern Imp. Co.*, 47 Mont. 314, Ann. Cas. 1915A, 1228, 132 Pac. 419, and *Morelli v. Twohy Bros.*, 54 Mont. 366, 170 Pac. 757, are a few of the many cases decided by this court during the past thirty years in which the rule is stated. Not only has this court repeatedly called attention to the fact that the master is not an insurer of the safety of his employee, the most recent case being *Barry v. Badger*, 54 Mont. 224, 169 Pac. 34, but we have frequently directed attention to instructions couched in language like the one under review, and have pointed out the error—that by such an instruction the master is made an absolute insurer. (*Leonard v. City of Butte*, 25 Mont. 410, 65 Pac. 425; *Anderson v. Northern Pac. Ry. Co.*, 34 Mont. 181, 85 Pac. 884; *Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794.) Under instruction 3 the railway company was compelled to have in its service a foreman infallible in his judgment and in the exercise of his functions as vice-principal, or pay the penalty in damages for any injury to its employees. It is true that courts and text-writers, in referring to the rule by way of argument, frequently employ inept language; but, whenever it becomes necessary to state it, there is no difference of opinion.

A decision of the other question presented by appellants is unnecessary, and we decline to consider it at this time.

The judgment and order are reversed, and the cause is remanded, with directions to enter judgment for defendants.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

Motion for rehearing denied October 21, 1918.

**FIRST STATE BANK OF HILGER, RESPONDENT, v. LANG,  
APPELLANT.**

(No. 3,922.)

(Submitted June 18, 1918. Decided July 9, 1918.)

[174 Pac. 597.]

*Negotiable Instruments—Accommodation Makers—Liability—  
Banks and Banking—Cashier—Ostensible Authority—Re-  
leasing Security—Directors—Contracts—Ratification—Laches  
—Directing Verdict.*

**Negotiable Instruments—Accommodation Maker—Liability.**

1. Under the negotiable instruments law (secs. 5844, 5877, Rev. Codes), an accommodation maker of a promissory note is primarily liable, and is not discharged by an extension of time given his comaker; the fact that plaintiff—a holder for value—knew that defendant was an accommodation maker did not change the rule.

[As to rights and liabilities of makers and indorsers of accommodation paper, see note in 31 Am. St. Rep. 745.]

**Same—Payable in Money.**

2. A promissory note legally imports a promise to pay in money only.

**Same—Renewal—Effect—Banks and Banking.**

3. In the absence of an agreement to the contrary, the effect of the renewal of a promissory note is to extend the time of payment, not to discharge the obligation, the act of the cashier of the payee bank in stamping "paid" upon the old note not changing the rule.

**Same—Banks and Banking—Authority of Cashier.**

4. The cashier of a bank, being its agent, cannot accept payment of a note in anything but money, in the absence of special authority to that effect.

**Same—Cashier of Bank—Ostensible Authority.**

5. Where the directors of a bank by inattention to their duties permit its cashier to conduct its affairs in a certain manner for a period sufficiently long to establish a settled course of business, his authority to do anything the board of directors might have authorized him to do will be implied in favor of an innocent third party, even though the bank is defrauded by his acts.

**Same—Banks—Cashier—Ostensible Authority—Who cannot Assert.**

6. The president of a bank who himself, as one of the board of directors, had carelessly permitted its cashier to conduct its affairs in his own way, was in no position to assert his own misconduct as the basis of ostensible authority in the cashier to release him from liability on a note on which his name appeared as one of the makers.

**Same—Banks—Ostensible Authority—How Conferred.**

7. Ostensible authority, within the meaning of section 5432, Revised Codes, in an agent (a bank cashier) to do an otherwise un-

authorized act, is not conferred by an isolated act of carelessness on the part of his principal, but can be derived only from a long course of misconduct indulged in by the latter.

**Same—Banks—Releasing Security.**

8. Without authority from the board of directors of a bank, neither the president nor its cashier can release one of its debtors from liability on a note, and where such power is asserted, clear and convincing proof is required to show that the board intended to confer it.

**Same—Banks—Directors—Dealing With Corporation—Burden of Proof.**

9. Whenever it appears that a director has been dealing with his corporation, the burden is on him to show that his dealings have been fair and honest and that it has not suffered from his acts.

**Same—Banks—Ratification of Act of Cashier.**

10. Under section 5429, Revised Codes, it is essential to the ratification of an unauthorized act of an agent, that the principal had full knowledge of all material facts relative to the transaction at the time of the alleged ratification.

**Same—Banks—Ratification of Act of Cashier—Availability of Defense.**

11. While knowledge of the affairs of a bank by its directors will be presumed in favor of an innocent third party where ratification of an unauthorized act of its cashier is alleged, no such presumption is indulged in favor of its president, who is also a director and who seeks to profit by such act by way of his release from liability on a promissory note signed by him as an accommodation maker.

**Same.**

12. Since the effect of an action against the maker of a note on which defendant bank president was jointly liable was to lessen the latter's liability by recovering what could be recovered from his comaker, defendant was not in position to assert that by bringing that action the bank had ratified the unauthorized conduct of its cashier (par. 11, above) and thus discharged him from further liability.

**Same—Laches.**

13. Where an action on a note is brought within the period of the statute of limitations, the defense of laches has no merit.

**Same—Banks—Authority of Cashier—Question of Law—Directing Verdict.**

14. Where the evidence touching the actual and ostensible power of a bank cashier to release security was undisputed, the question of his authority in the premises was one of law and the trial court could properly direct a verdict.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by the First State Bank of Hilger against H. H. Lang. Judgment for plaintiff, and from an order denying him a new trial, defendant appeals. Affirmed.

*Messrs. Belden & De Kalb*, for Appellant, submitted a brief and one in reply to that of Respondent; *Mr. H. L. De Kalb* argued the cause orally.

The contentions of appellant are: First. That the note, made the basis of this action, was regularly discharged. Second. That if the note was not regularly discharged in the first instance, the action of the cashier was ratified by long acquiescence and by the bringing of suit on the obligation. Respondent contends that the action of the cashier in stamping the note "paid" and surrendering it was unauthorized in law in that, as a general proposition, an obligation can never be said to be paid until it is surrendered for a sufficient consideration. With this general proposition we agree, but with its application to the facts in this case we cannot concur.

The management and control of the affairs of the bank were turned over or abandoned to Henderson, the cashier, and under such considerations the cashier has all the power of the bank. (1 *Morse on Banks & Banking*, secs. 165, 343; *Martin v. Webb*, 110 U. S. 7, 28 L. Ed. 49, 3 Sup. Ct. Rep. 428; *Merchants' Nat. Bank v. National Bank*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008; *Armstrong v. Chemical Nat. Bank*, 83 Fed. 556, 27 C. C. A. 601; *L'Herbette v. Pittsfield Nat. Bank*, 162 Mass. 137, 44 Am. St. Rep. 354, 38 N. E. 368; *Iowa Nat. Bank v. Sherman*, 17 S. D. 396, 106 Am. St. Rep. 778, 97 N. W. 12; *Carpey v. Dowdell*, 115 Cal. 677, 683, 47 Pac. 695; *Bank v. Shook*, 100 Tenn. 436, 45 S. W. 338; *Indianapolis Rolling Mills Co. v. St. Louis etc. Ry. Co.*, 120 U. S. 256, 30 L. Ed. 639, 7 Sup. Ct. Rep. 542; *Washington Sav. Bank v. Butchers' etc. Bank*, 107 Mo. 134, 28 Am. St. Rep. 405, 17 S. W. 644.) The above rule is said to obtain even though the action be in direct violation of a by-law which the directors negligently allowed to fall into disuse. (*Cox v. Robinson*, 82 Fed. 277, 27 C. C. A. 120.)

Where the principal attempts by suit to enforce the payment of notes received by the agent without authority, he thereby impliedly ratifies such act or contract. (*Dick v. Flanagan*, 122 Ind. 277, 7 L. R. A. 590, 23 N. E. 765; *Dickinson v. Wright*,

56 Mich. 42, 22 N. W. 312; *Ingraham v. Barber*, 72 Ga. 158; *Beidman v. Goodell*, 56 Iowa, 592, 9 N. W. 900; *West Boylston Mfg. Co. v. Searle*, 15 Pick. (Mass.) 225; *Osborn Co. v. Jordan*, 52 Neb. 465, 72 N. W. 479; *Corser v. Paul*, 41 N. H. 24, 77 Am. Dec. 753; *Chamberlain v. Woodward*, 22 Hun (N. Y.), 440; *La Grande Nat. Bank v. Blum*, 27 Or. 215, 41 Pac. 659.)

The cashier knew the relation of Lang to Smith on this paper. He was an accommodation party, hence a surety for Smith. His knowledge was imputed to the bank. (Michie on Banks and Banking, sec. 827.) An accommodation maker is treated as a surety by the California decisions construing section 2831 of the California Civil Code adopted by us as section 5680, Revised Codes. (*Kellogg v. Lopez*, 145 Cal. 497, 78 Pac. 1056; *Eppinger v. Kendrick*, 114 Cal. 620, 46 Pac. 613.)

*Messrs. Gunn, Rasch & Hall* and *Mr. C. J. Marshall*, for Respondent, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

A bank cashier or treasurer, as such, has no power to release a maker, drawer, indorser or surety of a bill or note. (*State Bank of Moore v. Forsyth*, 41 Mont. 249, 28 L. R. A. (n. s.) 501, and note, 108 Pac. 914; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. Rep. 479, 20 L. R. A. 780, 55 N. W. 631; *First Nat. Bank v. Gunhus*, 133 Iowa, 409, 9 L. R. A. (n. s.) 471, 110 N. W. 611; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Dedham Institute v. Slack*, 6 Cush. (Mass.) 408; *Hodge v. National Bank*, 22 Gratt. (Va.) 51; *Daviss Co. Assn. v. Sailor*, 63 Mo. 24.)

The cashier's act was never ratified by the directors of the bank, the fact that they may have had the means or opportunity to have acquired knowledge of Lang's transactions, not being sufficient to establish knowledge and ratification of the cashier's act thereof. (*Sehrt-Patterson Milling Co. v. Hughes*, 8 Kan. App. 514, 56 Pac. 143; *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646; *Pacific Vinegar & Pickle Works v. Smith*, 152 Cal. 507, 93 Pac. 85.) Furthermore, in order to

ratify the act of the cashier, the directors must act as a board in order to bind the bank. (3 R. C. L., sec. 65.)

The act of Lang in getting off this note was not ratified by the bringing of an action for the purpose of trying to collect from Smith, even if the directors then knew that Lang had signed the first note. (*Pacific Vinegar & Pickle Works v. Smith, supra*; *Goodyear Dental V. Co. v. Caduc*, 144 Mass. 85, 10 N. E. 483; see, also, *Triggs v. Jones*, 46 Minn. 277, 48 N. W. 1113; *Sohn v. Morton*, 92 Ind. 170; *Brown v. Fowler*, 133 Ala. 310, 32 South. 584; *Gardner v. Pitcher*, 109 App. Div. 106, 95 N. Y. Supp. 678.)

The Lang note has never been paid. The taking of a renewal note and returning the old one to the maker does not discharge the old debt and create a new one in the absence of express agreement to that effect, and such agreement must of course be made by one having authority to make it. (*First Nat. Bank v. Cottonwood L. Co.*, 51 Mont. 544; *First Nat. Bank v. White*, 60 N. J. Eq. 487, 46 Atl. 1092; *State Bank of Isanti v. Mutual Tel. Co.*, 123 Minn. 314, Ann. Cas. 1915A, 1082, 143 N. W. 912; *Fowler v. Walch*, 119 App. Div. 547, 104 N. Y. Supp. 54; *First Nat. Bank v. Gunhus*, 133 Iowa, 409, 9 L. R. A. (n. s.) 471, 110 N. W. 611; *Bridge v. Connecticut Mutual Life Co.*, 167 Cal. 774, 141 Pac. 375.)

Lang and Smith were jointly and severally liable on the note, and even if Lang was an accommodation maker, he was not discharged by any extension of time given to Smith. (3 R. C. L., sec. 506; *Union Trust Co. v. McGinty*, 212 Mass. 467, Ann. Cas. 1913D, 715, 98 N. E. 679; *Bradley Engineering, etc. Co. v. Heyburn*, 56 Wash. 628, 134 Am. St. Rep. 1127, 106 Pac. 170; *Cellers v. Meachem*, 49 Or. 186, 13 Ann. Cas. 997, 10 L. R. A. (n. s.) 133, 89 Pac. 426; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329; *Rouse v. Booten*, 140 N. C. 557, 111 Am. St. Rep. 875, 6 Ann. Cas. 280, 53 S. E. 430; *Vanderford v. Farmers' & M. Nat. Bank*, 105 Md. 164, 10 L. R. A. (n. s.) 129, 66 Atl. 47.) Mere failure to promptly pursue Smith and to try and realize on the collateral held did not discharge



Lang. (3 R. C. L., sec. 503; note to *Rogers v. Detroit Savings Bank*, 18 L. R. A. (n. s.) 531, 539; *Gray v. Farmers' Nat. Bank*, 81 Md. 631, 32 Atl. 518; *Carpenter v. McLaughlin*, 12 R. I. 270, 34 Am. Rep. 638; *Wolstenholme v. Smith*, 34 Utah, 300, 97 Pac. 329.)

Lang could not protect his private interests to the detriment of those of the bank. (*Gallery v. National Exchange Bank*, 41 Mich. 169, 32 Am. Rep. 149, 2 N. W. 193; *Bank of Isanti v. Mutual Tel. Co.*, *Fowler v. Walch*, *First Nat. Bank v. Gunhus*, *supra*; *Wallace v. Oceanic Packing Co.*, 25 Wash. 143, 64 Pac. 938; *Finley v. Cowles*, 93 Iowa, 389, 61 N. W. 998; *Commercial National Bank v. Chatfield*, 121 Mich. 641, 80 N. W. 712; *Lawrence v. Stearns*, 79 Fed. 878.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In March, 1908, Chas. W. Smith and H. H. Lang executed and delivered to the First State Bank of Kendall their promissory note for \$1,900, and, as additional security for the loan, Smith delivered to the bank 1,000 shares of the capital stock of the North Moccasin Mining Company. Although the note was not due until January, 1909, as early as April, 1908—the month following its execution—Lang importuned Smith to make payment on it, which Smith declined to do, and the like requests were repeated by Lang thereafter but unsuccessfully. On November 8, 1908, Smith executed and delivered to the bank a new note for \$2,695, due in one year, in renewal of the Smith-Lang note and a balance due on another note of Smith's, and the original note was stamped "Paid" and delivered to Smith. This renewal note was not signed by Lang but the collateral which secured the two notes was left with the bank as the only security for the new note. On April 2, 1909, this renewal note was taken up and a third note for \$3,612.87, signed by Smith and wife, was given in renewal of that note and for other advancements, and the second note was stamped "Paid" and delivered to Smith. In addition to the collateral which secured

the second note, Smith and wife executed and delivered to the bank a mortgage upon some real property in Kendall. On March 12, 1912, suit was instituted to enforce collection of this third note, and thereafter judgment was recovered and execution issued, but nothing was collected.

From the organization of the bank until November, 1912, Henderson was cashier and Lang was president of the bank, and each of them was a director. Plaintiff is the successor of the First State Bank of Kendall. This action was commenced against Lang to enforce payment of the Smith-Lang note for \$1,900 and accumulated interest. The defendant pleaded: (1) That he signed the note as accommodation for Smith, and that the bank extended the time of payment without his knowledge or consent; (2) that the bank was guilty of laches in prosecuting its claim against Smith; and (3) that the note was fully paid and discharged. Upon the trial and at the close of the testimony the court directed a verdict for the plaintiff, and defendant has appealed from an order denying him a new trial. There is not any conflict in the evidence except as to matters to which reference will be made hereafter.

Lang was general manager of the North Moccasin Mining Company, and owned considerable of its stock. The expenses of the company far exceeded its income, but notwithstanding this fact the stock had a market value of from \$1.90 to \$2 per share. Lang sold to Smith the 1,000 shares heretofore mentioned at \$1.90 per share. The money with which to pay for the stock was borrowed from the bank and the Smith-Lang note executed and delivered, the money received and immediately passed to Lang's credit, and the certificate of stock delivered to the bank as collateral. On November 1, 1908, the mining company defaulted in the payment of interest on its bonded indebtedness. In April, 1909, mining operations ceased. In September, 1909, a suit to foreclose was brought and prosecuted to decree and sale, and the stock became worthless.

Prior to November, 1912, the board of directors of the bank in disregard of its by-laws held no meetings except to elect officers, made no examinations of the bank's affairs, took no part in making or approving loans, but permitted Henderson to conduct the bank's business. The directors, other than Henderson and Lang, knew nothing of the Smith-Lang loan or of the renewals. In November, 1912, at a meeting of the board at which neither Henderson nor Lang was present, certain of the bank's loans, including the note for \$3,612.87 signed by Smith and wife, were approved. In January, 1914, the board discovered that Lang had signed the original note for \$1,900, and a demand was made upon him to pay it, and upon his refusal this action was brought.

1. Appellant contends that, having signed the Smith-Lang note as an accommodation party, he was liable only as a surety, [1] and was discharged by the extension of time granted to Smith without his knowledge or consent. With this we do not agree. A surety is only liable secondarily. The note reads:

"Jan. 10th, 1909, after date we or either of us promise to pay to the order of First State Bank of Kendall, nineteen hundred and no-100 dollars for value received," *etc.*, and was signed,

"CHAS. W. SMITH,

" H. H. LANG."

Section 5844, Revised Codes, provides: "The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable." By virtue of this statute Lang was primarily liable, and his primary liability was not affected by the fact that he signed the note for the accommodation of Smith, and that this fact was known to the bank, a holder for value. Section 5877, Revised Codes, defines an accommodation party, and then proceeds: "Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to

be only an accommodation party." The foregoing statutory provisions are portions of the Uniform Negotiable Instruments Act. They have been construed frequently, and the consensus of opinion is stated in 3 R. C. L., p. 1276, as follows: "Under the negotiable instruments law it may be regarded as well settled that the accommodation maker or acceptor is primarily liable, and is not discharged by any extension of time given to the indorser, drawer, or comaker, for whose benefit he became a party to the instrument, without regard to whether the party suing on the instrument is a party thereto as a payee, and had knowledge of the relation subsisting between the accommodation maker and the principal debtor."

2. A promissory note legally imports a promise to pay in [2, 3] money and nothing else. Unless there was an agreement between the bank and Smith that the renewal note of November 8, 1908, was given by Smith and accepted by the bank in payment and discharge of the debt represented by the Smith-Lang note, the effect of the renewal was merely to extend the time of payment, and did not discharge the obligation. (*First Nat. Bank v. Cottonwood Land Co.*, 51 Mont. 544, 154 Pac. 582.) The fact that the cashier stamped "Paid" upon the old note, and delivered it to Smith, did not operate to change the rule. (*Bridge v. Connecticut Mut. Life Ins. Co.*, 167 Cal. 774, 141 Pac. 375; *Scott v. Gilkey*, 153 Ill. 168, 39 N. E. 265; *First Nat. Bank v. White*, 60 N. J. Eq. 487, 46 Atl. 1092; *Lowther v. Lowther-Kaufmann Oil & Coal Co.*, 75 W. Va. 171, 83 S. E. 49; 8 C. J. 572; 1 Michie on Banks and Banking, p. 739.)

3. If the evidence is open to the inference that it was the [4] intention of the cashier to accept the renewal note in payment, and to discharge Lang, the inquiry arises, Had he any such authority?

The cashier of a bank is its agent, and his conduct is governed by the general rule of agency. (1 Michie on Banks and Banking, p. 712.) It is elementary that, in the absence of special authority, an agent cannot accept payment in anything but

money. (*United States Nat. Bank v. Shupak*, 54 Mont. 542, 172 Pac. 324.) An agent has such authority as the principal actually or ostensibly confers upon him. (Sec. 5430, Rev. Codes.) It is not contended that by virtue of his office the cashier had authority to release Lang; neither is it urged that he had received express authority from the board of directors [5] to do so; but it is insisted that, by turning over to the cashier the entire management of the bank, the board impliedly conferred upon him this extraordinary power, and 1 Morse on Banks and Banking, par. 165, is cited as authority to support this contention. But counsel misconceive the import of the author's language, for immediately following the rule it is said: "This doctrine is certainly a liberal one towards *innocent outsiders*." The same general rule is adverted to by Michie (1 Michie on Banks and Banking, p. 695), and concerning it that author says: "Nor is there any incongruity or departure from general principles in this, since it is merely the application of the very general principle that as regards *third persons* the officers and agents must be deemed clothed with whatever powers the bank has held them out as possessing in the same degree as if the authority had been expressly granted." In other words, the rule embodies the general principle of ostensible authority, and those terms are defined in section 5432, Revised Codes, as follows: "Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a *third person* to believe the agent to possess."

If the directors in disregard of their duties permit the cashier to conduct the affairs of the bank for a period sufficiently long to establish a settled course of business, his authority to do anything which the board might have authorized him to do [6, 7] in the first instance will be implied in favor of an innocent third party, even though the bank is defrauded by his acts. (1 Michie on Banks and Banking, p. 714.) But the doctrine of ostensible authority cannot be extended in favor of one who is familiar with the facts and whose dereliction is relied upon to give color to the agent's unauthorized acts.

**FIRST STATE BANK OF HILGER, RESPONDENT, v. LANG,  
APPELLANT.**

(No. 3,922.)

(Submitted June 18, 1918. Decided July 9, 1918.)

[174 Pac. 597.]

*Negotiable Instruments—Accommodation Makers—Liability—  
Banks and Banking—Cashier—Ostensible Authority—Re-  
leasing Security—Directors—Contracts—Ratification—Laches  
—Directing Verdict.*

**Negotiable Instruments—Accommodation Maker—Liability.**

1. Under the negotiable instruments law (secs. 5844, 5877, Rev. Codes), an accommodation maker of a promissory note is primarily liable, and is not discharged by an extension of time given his comaker; the fact that plaintiff—a holder for value—knew that defendant was an accommodation maker did not change the rule.

[As to rights and liabilities of makers and indorsers of accommodation paper, see note in 31 Am. St. Rep. 745.]

**Same—Payable in Money.**

2. A promissory note legally imports a promise to pay in money only.

**Same—Renewal—Effect—Banks and Banking.**

3. In the absence of an agreement to the contrary, the effect of the renewal of a promissory note is to extend the time of payment, not to discharge the obligation, the act of the cashier of the payee bank in stamping "paid" upon the old note not changing the rule.

**Same—Banks and Banking—Authority of Cashier.**

4. The cashier of a bank, being its agent, cannot accept payment of a note in anything but money, in the absence of special authority to that effect.

**Same—Cashier of Bank—Ostensible Authority.**

5. Where the directors of a bank by inattention to their duties permit its cashier to conduct its affairs in a certain manner for a period sufficiently long to establish a settled course of business, his authority to do anything the board of directors might have authorized him to do will be implied in favor of an innocent third party, even though the bank is defrauded by his acts.

**Same—Banks—Cashier—Ostensible Authority—Who cannot Assert.**

6. The president of a bank who himself, as one of the board of directors, had carelessly permitted its cashier to conduct its affairs in his own way, was in no position to assert his own misconduct as the basis of ostensible authority in the cashier to release him from liability on a note on which his name appeared as one of the makers.

**Same—Banks—Ostensible Authority—How Conferred.**

7. Ostensible authority, within the meaning of section 5432, Revised Codes, in an agent (a bank cashier) to do an otherwise un-

authorized act, is not conferred by an isolated act of carelessness on the part of his principal, but can be derived only from a long course of misconduct indulged in by the latter.

**Same—Banks—Releasing Security.**

8. Without authority from the board of directors of a bank, neither the president nor its cashier can release one of its debtors from liability on a note, and where such power is asserted, clear and convincing proof is required to show that the board intended to confer it.

**Same—Banks—Directors—Dealing With Corporation—Burden of Proof.**

9. Whenever it appears that a director has been dealing with his corporation, the burden is on him to show that his dealings have been fair and honest and that it has not suffered from his acts.

**Same—Banks—Ratification of Act of Cashier.**

10. Under section 5429, Revised Codes, it is essential to the ratification of an unauthorized act of an agent, that the principal had full knowledge of all material facts relative to the transaction at the time of the alleged ratification.

**Same—Banks—Ratification of Act of Cashier—Availability of Defense.**

11. While knowledge of the affairs of a bank by its directors will be presumed in favor of an innocent third party where ratification of an unauthorized act of its cashier is alleged, no such presumption is indulged in favor of its president, who is also a director and who seeks to profit by such act by way of his release from liability on a promissory note signed by him as an accommodation maker.

**Same.**

12. Since the effect of an action against the maker of a note on which defendant bank president was jointly liable was to lessen the latter's liability by recovering what could be recovered from his comaker, defendant was not in position to assert that by bringing that action the bank had ratified the unauthorized conduct of its cashier (par. 11, above) and thus discharged him from further liability.

**Same—Laches.**

13. Where an action on a note is brought within the period of the statute of limitations, the defense of laches has no merit.

**Same—Banks—Authority of Cashier—Question of Law—Directing Verdict.**

14. Where the evidence touching the actual and ostensible power of a bank cashier to release security was undisputed, the question of his authority in the premises was one of law and the trial court could properly direct a verdict.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by the First State Bank of Hilger against H. H. Lang. Judgment for plaintiff, and from an order denying him a new trial, defendant appeals. Affirmed.

do not agree. Whether Henderson had authority to release Lang was a question of law. The evidence touching his actual and ostensible powers is undisputed. Henderson testified that he took the renewal note without Lang's signature, at Lang's suggestion and request. This Lang denies, but, if Henderson had no authority to release him, it is immaterial upon whose suggestion he acted.

The determination that Lang was primarily liable upon the Smith-Lang note disposes of the other contentions urged by appellant.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

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STATE EX REL. BROWN, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 4,237.)

(Submitted June 19, 1918. Decided July 10, 1918.)

[174 Pac. 601.]

*Mandamus—New Trial—Notice of Intention—Entry of Judgment—Notice—Waiver—Time—Fractions of Day—Laches.*

New Trial—Entry of Judgment—Notice—Waiver.

1. The party intending to move for a new trial may waive formal notice of entry of judgment and serve his notice of intention without it.

Same—Entry of Judgment—Notice of Intention—Timely Service.

2. Section 6796, Revised Codes, requires that service and filing of a notice of intention to move for a new trial shall be made *after* entry of judgment. A judgment was lodged with the clerk of the district court on the 22d of the month but not entered in the judgment book until the 23d. *Held*, on application for writ of mandate to compel settlement of a bill of exceptions, that a notice served and filed the 23d and *before* actual entry of the judgment was not ineffectual.



Same—Time—Fractions of Day—To be Disregarded, When.

3. In passing upon a motion for a new trial where the only question raised by the prevailing party in opposition has to do with the regularity of procedural steps taken by the moving party, courts should disregard fractions of a day.

Same—*Mandamus*—Laches.

4. Where a party made repeated efforts, covering a period of about eighteen months, to have a bill of exceptions and statement of the case settled and his motion for new trial disposed of, he was not, on his application for writ of *mandamus* to compel action by the district judge, chargeable with laches.

Original application for writ of *mandamus* by the State, on the relation of D. E. Brown, against the District Court of the Tenth Judicial District in and for the County of Fergus, and the Judge thereof. Writ issued.

*Messrs. Belden & De Kalb* and *Messrs. Gunn, Rasch & Hall*, for Relator, submitted a brief; *Mr. H. L. De Kalb* argued the cause orally.

*Messrs. Blackford & Huntoon*, for Respondents, submitted a brief; *Mr. W. M. Blackford* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Application for writ of *mandamus*. From the affidavit for the writ we gather these facts: On June 17, 1916, in an action tried in the district court of Fergus county by Hon. Roy E. Ayers, wherein one H. I. Slack was plaintiff and D. E. Brown, the relator herein, was defendant, the plaintiff recovered judgment. On June 21 the formal judgment was signed by the judge, and on the following day was delivered to the clerk who, over his signature by one of his deputies, indorsed thereon the following: "Filed June 22, 1916." Above this indorsement was written at the same time the word "Entered." On June 23 the clerk made up and marked "filed" the judgment-roll as required by the statute. (Rev. Codes, sec. 6806.) On that day the judgment was recorded in the judgment-book and the appropriate memoranda made upon the judgment docket. On the same day defendant's notice of intention to move for a new

trial was served upon counsel for plaintiff, defendant's counsel expressly waiving notice of entry of judgment and stating that the motion would be made upon the minutes of the court and a bill of exceptions thereafter to be prepared and served. Service was accepted by counsel for plaintiff without objection or reservation. Formal notice of the entry of judgment was given by counsel for plaintiff on June 24. Extensions of time in which to prepare and serve the bill were granted by the court. Within the time so extended the draft of the proposed bill was served. Counsel for plaintiff proposed amendments. The draft of the bill and the amendments were lodged in the office of the clerk for the judge for settlement. Accompanying the amendments was the following reservation: "Now comes the plaintiff above named and expressly reserving to himself all right to object to the settlement and allowance of defendant's proposed bill of exceptions herein, and without waiver of any right to object to the said proposed bill of exceptions or the settlement thereof, now proposes to the defendant's proposed bill of exceptions the following changes and amendments, to-wit," *etc.* The settlement of the bill having been brought on for hearing on January 31, 1917, counsel for plaintiff appeared specially, and objected that the court was without jurisdiction because the notice of intention had been served and filed prior to the entry of judgment instead of afterward, as provided by the statute. (Rev. Codes, sec. 6796.) In support of the objection, counsel presented the affidavits of one of the clerk's deputies and of a recording clerk employed in the office, from which it appeared that the notice of intention with proof of service was filed in the forenoon of June 23, and that the judgment was formally spread upon the judgment-book in the afternoon of that day. The court sustained the objection, and entered an order refusing to settle the bill. On March 29 counsel for defendant moved the court for a reconsideration of its order. On August 29 the court, having had the matter under advisement until that time, denied the motion. Counsel for defendant thereafter, on October 1, brought on for decision the

motion for a new trial as based on the minutes of the court. This the court by an order made on January 19, 1918, refused to consider for the same reason as that stated in the order of January 31, 1917. On May 27 the court refused an application for a settlement of a statement of the case embodying the minutes of the court. At the same time it again refused to determine the motion for a new trial. The purpose of this application is to compel Judge Ayers to settle relator's bill of exceptions and to hear and dispose of his motion for a new trial. In response to the alternative writ, the defendant court appeared by counsel, and moved to quash it and dismiss the proceeding on the grounds that the facts stated do not warrant the relief demanded, and that the relator was guilty of inexcusable delay in applying for the writ. In support of the motion counsel presented an elaborate brief, but, after careful consideration of it, we think the motion should be denied, and that the writ should be made peremptory.

The service of the notice of intention was timely. The re-  
 [1] lator was not required to wait for formal notice of the entry of judgment. The provision of the statute (Rev. Codes, sec. 6796) that the party intending to move for a new trial must give notice of intention within ten days after notice of entry of judgment is clearly intended for the benefit of the moving party. Hence he may waive the requirement of formal notice and proceed without it (Rev. Codes, sec. 6181; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, [2] 146 Pac. 469). Nor do we think the notice abortive because it was served and filed before the judgment was actually spread at large upon the judgment-book. It is the duty of the clerk to enter a judgment as soon as it is lodged with him for that purpose, and the presumption that he has done so should be deemed conclusive for all purposes except when a question of priority of substantial right arises, rendering necessary an inquiry into the order of sequence of events occurring on the same day. (*Kelly v. Independent Pub. Co.*, 45 Mont. 127, Ann. [3] Cas. 1913D, 1063, 38 L. R. A. (n. s.) 1160, 122 Pac. 735.)

Here no question of priority arises, but one as to the regularity of procedure only. In such a case the court ought not to take notice of fractions of a day to reject jurisdiction of a motion for a new trial, and thus defeat the moving party, but indulge the presumption that the entry of judgment and the service of notice had taken place in regular sequence. The court should have disregarded the affidavits presented in support of the objection, settled the bill, and determined the motion on its merits.

The contention that the relator was guilty of laches is without merit. Although his various applications to the trial court to have the bill of exceptions and statement settled and the motion for a new trial disposed of were futile, the fact that he made them and pressed them upon the attention of the court relieves him of the charge. It is therefore ordered that the alternative writ be made peremptory.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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CHICAGO, MILWAUKEE & ST. PAUL RY. CO., APPELLANT,  
v. MURRAY, COUNTY TREASURER, RESPONDENT.

(No. 4,225.)

(Submitted June 15, 1918. Decided July 11, 1918.)

[174 Pac. 704.]

*Taxation—Railroads—Electrification System—Constitution.*

Railroads—Electrification System—Transmission Line—By Whom Taxable.

1. *Held*, that the transmission line by means of which electric current after having been transformed is carried to trolley wires, and owned and used by a transcontinental railway company in connection with the propulsion of its trains through electric motors, is no part of the roadbed, roadway, franchise, rails or rolling-stock, enumerated in section 16, Article XII, of the Constitution, as assessable by the state board of equalization, and is therefore properly assessable by the assessor of the county in which it is found.

Same—Trolley Wires—By Whom Taxable.

2. *Held*, further, that since that part of plaintiff railway's electrification system consisting of a trolley line is a permanent structure affixed to the roadbed and extends continuously along the railway line, with wires and other attachments connected to each other and to the rails, it is assessable by the state board of equalization and not by the assessor of any county.

Constitution—Nature of Instrument.

3. The state Constitution was by its framers intended to be a live instrument, adaptable to the progress and changing conditions of men and affairs.

*Appeal from District Court, Granite County; Geo. B. Winston, Judge.*

ACTION by the Chicago, Milwaukee & St. Paul Railway Company, a corporation, against A. J. Murray, County Treasurer of Granite County, Montana. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

*Messrs. Gunn, Rasch & Hall*, for Appellant, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

That the assessment by a county assessor of that part of the electrification system in his county, without reference to the valuation of the entire system in connection with the railroad, would not be a just valuation for the purpose of taxation as required by the Constitution, and that a just valuation can only be made on the basis of the valuation of the entire railroad with the electrification system as an adjunct thereto is, we think, supported by the decision in the case of *Cleveland etc. R. R. Co. v. Backus*, 154 U. S. 439, 38 L. Ed. 1041, 14 Sup. Ct. Rep. 1122.

We submit that the electrification system described in the complaint is included in the category of property which the state board of equalization is required to assess when section 16 of Article XII of the Constitution is construed according to the spirit and intent of the section. As said by Chief Justice White in the opinion in the case of *Downes v. Bidwell*, 182 U. S. 244, 45 L. Ed. 1088, 21 Sup. Ct. Rep. 770, a Constitution should be interpreted "by the spirit which vivifies, and not by the letter which killeth." (See, also, *State v. Sullivan*, 48 Mont.

320, 137 Pac. 392; *State v. Alderson*, 49 Mont. 387, Ann. Cas. 1916B, 39, 142 Pac. 210; *South Carolina v. United States*, 199 U. S. 437, 4 Ann. Cas. 737, 50 L. Ed. 261, 26 Sup. Ct. Rep. 110; *In re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900; *Harshman v. Bates County*, 92 U. S. 569, 23 L. Ed. 747; *Elwell v. Comstock*, 99 Minn. 261, 9 Ann. Cas. 270, 7 L. R. A. (n. s.) 621, 109 N. W. 113, 698; *Jarrott v. Moberly*, 103 U. S. 580, 26 L. Ed. 492.)

By the Constitution, rolling stock is required to be assessed by the state board. The electrification system furnishes the motive power for moving the train. It takes the place of steam and dispenses with the necessity of an engine and a tender to carry the coal. In other words, it has replaced the steam locomotive and it is a substitute for the rolling stock of a railroad to that extent. When, therefore, the Constitution is construed with reference to its spirit and intent, the electrification system should be treated and considered as a part of the rolling stock of the railroad. (*State v. Keating*, 53 Mont. 371, 163 Pac. 1156.)

In view of the fact that the Constitution of Montana does not require, as does the Constitution of California, that "land and the improvements thereon shall be separately assessed," and in view of the further fact that the former does not require, as does the latter, that all property subject to taxation, except that specially mentioned in section 10 of Article XII, shall be assessed locally, the rule of taxation of railroad property, adopted and followed in North Dakota, is the rule which should be applied in this state. (See *Chicago, M. & St. P. Ry. Co. v. Cass County*, 8 N. D. 18, 76 N. W. 239; *Minneapolis etc. Ry. Co. v. Oppsgard*, 18 N. D. 1, 118 N. W. 830.) In the first case cited above, it was decided that the term "roadway" is synonymous with right of way, and included not only the right of way proper, but also station grounds, switching grounds, etc., outside of the main right of way. In the case of *Minneapolis etc. Ry. Co. v. Oppsgard*, cited above, it was decided that a telegraph line used in operating a railroad and also for com-

mercial purposes was not assessable by the state board. In the opinion, however, it was said that "it will not be disputed that a telegraph line, used exclusively for the moving of trains and the dispatching of railroad business, is not assessable independently or separately from the railroad property."

The Revenue Act of Montana, adopted in 1891, was copied from the revenue law of California. The fact that in California the Constitution required that lands and the improvements thereon should be assessed separately, and that all taxable property, except that mentioned in the section of the Constitution of that state, providing for the assessment of the franchise, roadway, roadbed, rails and rolling stock of railroads operated in more than one county, should be assessed locally, was apparently overlooked. If the legislative assembly of Montana had recognized the distinctions between the Constitution of California and that of Montana pointed out, the rule of taxation of railroad property which prevails in North Dakota would undoubtedly have been adopted. It is, we believe, beyond question that the framers of the Constitution intended by the use of the term "roadway" to include improvements which are situated on the roadway and are used solely for railroad purposes. It is true that the term "rails" is found in section 10 of Article XII, but the reason for this is undoubtedly due to the fact that rails are regarded as trade fixtures and are not considered a part of the land. (*Wiggins Ferry Co. v. Railroad Co.*, 142 U. S. 396, 35 L. Ed. 1055, 12 Sup. Ct. Rep. 188; *Wagner v. Cleveland & Toledo R. R. Co.*, 22 Ohio St. 563, 10 Am. Rep. 770; *Northern Central Ry. Co. v. Canton Co.*, 30 Md. 347; *Railway Co. v. Le Blanc*, 74 Miss. 626, 21 South. 748; *Skinner v. Ft. Wayne etc. Ry. Co.*, 99 Fed. 465; *Illinois Cent. R. R. Co. v. Hoskins*, 80 Miss. 730, 92 Am. St. Rep. 612, 32 South. 150; *Georgia R. R. & Banking Co. v. Haas*, 127 Ga. 187, 119 Am. St. Rep. 327, 56 S. E. 313.)

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent, submitted a brief; *Mr. Woody* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The motive power of the Chicago, Milwaukee & St. Paul Railway for a distance of 440 miles in this state, extending across several counties thereof, including the county of Granite, is electric; that is to say, its trains are drawn by electric motors instead of by steam engines. These motors receive the current necessary to actuate them from a trolley wire suspended directly over the center of each track. The current itself comes from remote plants not owned by the railway, and is conveyed by means of poles, towers and wires—the property of the supplying company—to seven of fourteen substations, where it is transformed and sent out along a transmission line to the other substations. The transmission line is located on the right of way, at a uniform distance of thirty-eight feet from the center of the main track, and it, together with all the substations, belongs to the railway company. From the substations the transformed current is carried to the trolley wires, which are hung from poles and brackets spaced about one hundred and fifty feet apart. These poles are set in the roadbed at a uniform distance of ten feet from the center line of the track, and they carry the necessary feeders, signal wires, message wires, wires for the power limit and indicating systems. To the same poles is attached a supplementary negative wire, which at certain points is connected with bonds attached to the rails, and the joints of all rails are bonded by a copper wire, so that, as the motor makes contact with the trolley wire, a circuit is completed through the rails, bonds and supplementary wire to the substations.

It is alleged in the complaint, which is by the railway company against the treasurer of Granite county, that this electrification system is used exclusively in the operation of its railroad, is necessary to the efficient and economical operation thereof, and constitutes a single continuous system; that the company made no return of it to the assessor of Granite county for the year 1917, but said assessor, notwithstanding, assessed 29.63 miles of the transmission line at a valuation of \$2,830 per mile,



and 33.71 miles of the trolley line at \$5,179 per mile, which assessment the company contested without avail before the county board of equalization, upon the ground that the property so assessed is within the jurisdiction of and assessable only by the state board of equalization, under the provisions of section 16, Article XII, of the state Constitution; that the taxes levied accordingly, amounting to \$7,756.49, were paid under protest specifying the same ground; that the state board of equalization in its assessment of the franchise, roadway, roadbed, rails, and rolling stock of the company for the year 1917 included in and valued as a part of the valuation placed upon such property the said electrification system hereinabove described. The prayer is for a recovery of the moneys so paid under protest. The treasurer filed a general demurrer, and, this being sustained, judgment of dismissal was entered, from which the railway company appeals.

But one question is presented, whether the county assessor [1] of Granite or the state board of equalization had the authority to assess the transmission line, or the trolley line, or both, as constituting the system of electrification; for it must be conceded — as the attorney general does concede — that both agencies could not act upon the same property, and the company cannot lawfully be subjected, as it has been, to a double imposition of the same tax upon the same property.

No solution of this question is entirely free from objection. Section 16 of Article XII of the Constitution provides: "All property shall be assessed in the manner prescribed by law except as is otherwise provided in this Constitution. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization and the same shall be apportioned to the counties, cities, towns, townships and school districts in which such railroads are located, in proportion to the number of miles of railway, laid in such counties, cities, towns, townships and school districts." The meaning of this is perfectly clear, viz., whatsoever is franchise, or roadway, or road-

bed, or rails, or rolling stock of a railroad operating in more than one county must be assessed by the state board of equalization; all other property, whether it be of a railroad or other owner, may or may not be similarly assessed, according to the provisions of statute in existence at any given time. So far as it goes, this distinction may be said to indicate a policy to leave with the state board such railroad property as is continuous, as constitutes the necessary *corpus* of the railroad, as is not susceptible of a general valuation in sections. But this indication is only so far as the language permits, for whatever the reason may have been, the restriction of the language to franchise, roadway, roadbed, rails and rolling stock must be taken as conclusive. (*Northern Pac. Ry. Co. v. Brogan*, 52 Mont. 461, 158 Pac. 820.) That it does not go so far as to comprehend a telegraph line placed on the right of way and used only for railroad purposes was decided in the *Brogan Case* just cited, and that it does not comprehend any other structures similarly placed follows of necessity if we are to adhere to that decision. We have carefully re-examined that decision, and we are satisfied with it as a correct application of the constitutional provision here involved to the facts of that case, and under it we are obliged to hold that the transmission line now in question is no more a part of the roadbed or roadway than the substations which it connects. It was therefore properly assessable by the assessor of Granite, and not by the state board of equalization, unless it can be considered as part of the franchise, rails or rolling stock. That it cannot be considered as part of the franchise or rails is conceded. But there is contention that it properly belongs to rolling stock because the electrification system of which it is a part takes the place of the steam engine, which is rolling stock, as well as of cars—one of seven, it is said—necessary on steam railroads for the transportation of fuel. We think this is untenable. The electrification system does not take the place of steam engines or fuel cars, and would not be rolling stock if it did. (*Ohio & M. Ry. Co. v. Weber*, 96 Ill. 443; *Flanagan v. Graham*, 42 Or. 403, 71 Pac. 137, 790.) The place

of the steam engines is taken by the electric motors, which are rolling stock assessable as such, and the fuel cars remain available for other service, and still assessable as rolling stock. If any analogy is applicable—and analogies in such matters are sometimes misleading—it would rather regard the electrification as fuel, for the entire system is an elaborate contrivance to get to the electric motor the force in the form which will make the motor effective; and, as the steam engine is powerless without fuel, though still a steam engine, so the electric motor is dead without current, though it requires only that to make it powerful.

Considered separately, the trolley line is in a different situation. [2] Though no part of the franchise or rolling stock, it is a permanent structure affixed to the roadbed; it extends continuously across the electrified section of the railroad; it is so constructed that all its wires and other attachments are connected to each other and to the rails, so that when a motor is in contact, a circuit is formed, and thus the motor is enabled to function. We are therefore, neither in principle nor on the facts, aided by the *Brogan* decision in determining the status of this trolley line, but may, if so it appears, view it as part of the roadbed, if not by reason of its integration with the rails a part of them, and thus carry into effect the spirit as well as the letter of the constitutional provision here invoked. In the *Brogan Case* we held the term “roadway” as used in section 16 of Article XII, to be by legislative construction synonymous with “right of way,” meaning by the latter term “the bare strip of ground upon which the roadbed, rails and other necessary appliances of the road are laid or erected, and not as including any of the improvements upon or annexed to that strip.” This was because of statutory provisions (Laws 1891, pp. 73–80), requiring structures on the right of way to be separately assessed by the assessor of each county. No such provisions and no such construction confront us here. On the contrary, there stands the rule, then and now expressed by statute, that structures affixed to realty are part of the realty to

which they are affixed. The roadbed is that part of the right of way especially prepared for the emplacement of ties, rails and other necessary superstructures, and to which the ties, rails and other necessary superstructures are affixed. (Elliott on Railroads, 2d ed., sec. 5.) There seems to be no reason for the special mention of the roadbed in section 16 of Article XII, where the roadway, of which it is a part, and the rails, which form part of the superstructure upon it, are also mentioned, unless the roadbed was intended to embrace continuous structures permanently affixed to it, other than the rails. The same considerations which make it desirable that the rails and roadbed shall be assessed as a whole by the only agency which can so assess them apply as well to any other continuous structure [3] affixed to the roadbed. We are to bear in mind that the framers of the Constitution intended it to be a live instrument adaptable to the progress and changing conditions of men and affairs (*State v. Keating*, 53 Mont. 371, 163 Pac. 1156); and, if by the language of section 16, Article XII, they have necessarily excluded the transmission line, we are still to apply the general purpose of the provision written by them, and thus include within its purview the trolley line and its attachments, because they are within and not without the scope of the language employed.

We realize that in a large sense the transmission line and the trolley line are parts of one electrification system, and that their separation into two taxation jurisdictions may not, at first blush, commend itself. So, also, may it be said that the substations are part of the same electrification system; but it is not questioned that these are within the jurisdiction of the local assessor. In point of fact, every piece of property owned and used in the operation of a railroad contributes to the usefulness, and to some extent enters into the value, of the railroad considered as a whole, yet by the Constitution some of these are regarded as primarily local in character, and therefore not within the jurisdiction of the state board. If as a result the command of the Constitution becomes inharmonious with a

strictly scientific view of what ought to be the rule, that is one of the many things which illustrate the price paid under all constitutional governments for the boon of certainty. But we are not required to increase this inharmony any more than we are authorized by any power vested in us to abolish it where it unquestionably exists.

It follows that so far as the trolley line is concerned, a cause of action was stated in the complaint, and the demurrer thereto should have been overruled. The judgment is therefore reversed and the cause remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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NORTHERN PACIFIC RY. CO., RESPONDENT, v. DIXSON,  
COUNTY TREASURER, APPELLANT.

(No. 4,205.)

(Submitted June 15, 1918. Decided July 11, 1918.)

[174 Pac. 706.]

*Taxation—Railroads—Block-signal System—By Whom Taxable.*

1. *Held*, that a block-signal system which is located on the roadbed of a transcontinental railroad and attached to the rails in such a manner as to be operated automatically by passing trains is assessable by the state board of equalization and not by any county assessor.

*Appeal from District Court, Stillwater County; Albert P. Stark, Judge.*

ACTION by the Northern Pacific Railway Company against E. B. Dixon, as treasurer of Stillwater County, Montana. Judgment for plaintiff and defendant appeals. Affirmed.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Appellant, submitted a brief; *Mr. Woody* argued the cause orally.

*Messrs. Gunn, Rasch & Hall*, for Respondent, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

MR. JUSTICE SANNER delivered the opinion of the court.

The complaint in this case is similar to that presented in *Chicago, M. & St. P. Ry. Co. v. Murray*, ante, p. 162, 174 Pac. 704, except that it involves the block-signal system of the Northern Pacific Railway as the same traverses Stillwater county. The appellant treasurer of Stillwater county filed a general demurrer, which was overruled, and he, declining to plead further, suffered judgment to be entered according to the prayer of the complaint, from which judgment this appeal is taken.

Since, as the complaint avers, the block-signal system "is [1] located on the roadbed and adjacent to the track of said railroad, and is attached to the track and the rails thereof" in such a manner as to be operated automatically by passing trains, it comes within the rule announced in the *Murray* decision relative to the trolley line, and is assessable by the state board of equalization, and not by the county assessor.

The judgment is therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

CAVANAUGH, RESPONDENT, v. CORBIN COPPER CO.,  
APPELLANT.

(No. 3,925.)

(Submitted June 18, 1918. Decided July 11, 1918.)

[174 Pac. 184.]

*Nuisances—City Property—Quartz Mining—Deeds—Reservation of Minerals—Surface Owners—Estoppel.***Nuisances—What may and What Does not Constitute.**

1. While, under section 6162, Revised Codes, defining a private nuisance, a legitimate and useful business or occupation cannot be suppressed on account of a trivial annoyance, one may not be driven from his home or compelled to live in positive discomfort in order to accommodate another in the pursuit of a business which offends the mind and taste of the average person.

**Same—Quartz Mining.**

2. A business otherwise lawful and useful, such as mining, may become a nuisance by reason of its location or the manner in which it is being conducted.

**Same—Mining—What are not Defenses.**

3. Where mining operations constitute a nuisance, it is no defense that they were carried on according to approved methods, that due care was exercised, or that mining is necessary to the industrial life of the particular district.

**Same—Mining—Evidence—Sufficiency.**

4. Evidence held sufficient to warrant a finding that quartz mining operations carried on in a residential portion of a city constituted a private nuisance within the meaning of section 6162, Revised Codes.

**Same—City Property—Reservation of Minerals—Estoppel.**

5. Where the minerals underneath a city addition were reserved to the grantor in a deed to lots sold for residence purposes, with the right to mine the same, provided that in the exercise of such right the occupant of the surface should not be disturbed, damaged or interfered with in its use and enjoyment, the purchaser was not estopped to complain of the manner in which mining was being carried on.

[As to coal mine, yard or the like as a nuisance, see note in Ann. Cas. 1915D, 841.]

*Appeal from District Court, Silver Bow County; John B. McClernan, Judge.*

ACTION by M. J. Cavanaugh against the Corbin Copper Company, a corporation, and others. From a judgment for plain-

For authorities dealing with the question as to whether operation of mine constitutes a nuisance, see note in L. R. A. 1917B, 313.

tiff, and an order denying its motion for a new trial, the Copper Company appeals. Affirmed.

*Messrs. Shelton & Furman* and *Mr. A. J. Verhagen*, for Appellant, submitted a brief; *Mr. Frank Walker*, of Counsel, argued the cause orally.

To reach the minerals beneath the surface a miner must pass from the surface downward; otherwise, he cannot reach or work the mines beneath. This necessity gives the owner of the minerals rights reasonably requisite. He is not liable for any incidental damage necessarily occasioned by the ordinary and careful operation of his mine. (*Williams v. Gibson*, 84 Ala. 228, 5 Am. St. Rep. 368, 4 South. 350.) Nor is the mine owner responsible to the surface owner for disturbances caused by necessary blasting in the mine. (*Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40.) When mines are expressly excepted from a grant of land, at common law, the grantor had a way to work them, not by a balloon, but by a way reasonable at the time of the actual use. There is no other measure of the right than the common convenience and use of mankind. (*Artram v. Dobbs*, Ir. L. R., 30 C. L. 424.) A grant of coal in place, with the right to mine the same, carries with it the right to build railway tracks on the surface. (*Potter v. Rend*, 201 Pa. St. 318, 50 Atl. 821, 22 Morr. Min. Rep. 1; *Dand v. Kingscote*, 6 Mees. & W. 174.) The case of *Conigas Mines v. Cobalt*, 20 Ont. L. Rep. 622, holds that the owner of mineral rights in fee simple has the same rights to surface uses as defendants contend for in this case. (*Wardell v. Watson*, 93 Mo. 107, 5 S. W. 605.) The right to mine and excavate for coal carries with it as incidental thereto the right to go upon the land and dig for it and sink a shaft. (*Ewing v. Sandoval Coal Co.*, 110 Ill. 290; *Baker v. Pittsburg Co.*, 219 Pa. St. 398, 68 Atl. 1014.) A reservation of oil beneath the surface saves to the grantor the right to go upon the land and dig for oil in a reasonable manner. (*Dietz v. Mission Transfer Co.*, 95 Cal. 92, 30 Pac. 380.)



A case in many respects squarely in point is *Marvin v. Breuster Iron Co.*, 55 N. Y. 538, 14 Am. Rep. 322, 13 Morr. Min. Rep. 40.

Is a mine a nuisance or a public use, and does ordinarily prudent and careful mining constitute a nuisance? The letter and policy of the law and the decisions of the courts unquestionably answer both interrogatories in such manner that the plaintiff's contentions are wholly defeated, and the defendants' entirely justified. A mine is not a nuisance, but is a public use. (*Butte, A. & P. Ry. Co. v. Montana Union Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232; *Ellinghouse v. Taylor*, 19 Mont. 462, 48 Pac. 757; Lindley on Mines, 3d ed., p. 596.) Mining companies operating in a reasonably prudent and careful manner are protected by the law against the claims of all persons who assert that the industry which supports us all is to them personally objectionable. (*Kipp v. Davis-Daly Copper Co.*, 41 Mont. 509, 21 Ann. Cas. 1372, 36 L. R. A. (n. s.) 666, 110 Pac. 237.)

*Mr. J. A. Poore*, for Respondent, submitted a brief and argued the cause orally.

A nuisance resulting from noises of a railroad is a permanent nuisance depreciating the value of property, and all damages may be recovered in a single action. (*Frankle v. Jackson*, 30 Fed. 398; *Chicago etc. R. R. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326; *Müller v. Edison Elec. Co.*, 184 N. Y. 17, 6 Ann. Cas. 146, 3 L. R. A. (n. s.) 1060, 76 N. E. 734.) Where the nuisance is permanent in character, future, prospective and past damages are recoverable. (*Jos. Schlitz Co. v. Compton*, 142 Ill. 511, 34 Am. St. Rep. 92, 18 L. R. A. 390, 32 N. E. 693; *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 792; *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 43 Am. St. Rep. 611, 59 N. W. 925; *Consolidated Home etc. Co. v. Hamlin*, 6 Colo. App. 341, 40 Pac. 582; *Watson v. Colusa-Parrot etc. Co.*, 31 Mont. 513, 79 Pac. 14; *Chicago B. & Q. Ry. Co. v. O'Connor*, 42 Neb. 90, 60 N. W. 326.)

Depreciation in value is an element of damage. (*Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336; *Swift v. Broyles*, 115 Ga. 885, 58 L. R. A. 390, 42 S. E. 277.) If the proof shows with reasonable certainty a wrong by which the value of property in the neighborhood is depreciated, damages should be allowed for the injury past, present and prospective. (*City of Ardmore v. Orr*, 35 Okl. 305, 129 Pac. 871.) Future prospective damages are recoverable. (*Jos. Schlitz Co. v. Compton*, *supra*; *Powers v. Council Bluffs*, 45 Iowa, 652, 24 Am. Rep. 793; *Quinn v. Chicago etc. Ry. Co.*, 63 Iowa, 510, 19 N. W. 336; *Watson v. Colusa-Parrot etc. Co.*, *supra*.)

To constitute a taking of property it is not necessary that there be actual deprivation of the property. If the owner is prevented from having the full and undisturbed use and enjoyment of his property, as by making it uninhabitable by smells, odors or noise, or even less desirable, by such means, there will be a taking of property for which compensation must be made. (*Pumpelly v. Green Bay Co.*, 13 Wall. (U. S.) 166, 20 L. Ed. 557; *Cogswell v. New York etc. Ry. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Eaton v. Boston etc. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147.) Enjoyment of plaintiff's premises under the circumstances would require nerves of brass and heart of steel. (*Ashbrook v. Commonwealth*, 1 Bush (Ky.), 139, 89 Am. Dec. 620.) Noises, jars, vibrations resulting from the use of machinery which impairs the useful enjoyment of the premises and affected the value of the property is a nuisance. (*Bly v. Edison Elec. etc. Co.*, 172 N. Y. 1, 58 L. R. A. 500, 64 N. E. 745; 21 Am. & Eng. Ency. of Law, p. 706; *Choctaw etc. R. R. Co. v. Drew*, 37 Okl. 396, 44 L. R. A. (n. s.) 38, 130 Pac. 1149; *Blomen v. N. Barstow Co.*, 35 R. I. 198, 44 L. R. A. (n. s.) 236, 85 Atl. 924.)

A lawful business may become a nuisance by being located in an inappropriate place. (*Gilbert v. Showerman*, 23 Mich. 448.) Any trade or business injuring property is a nuisance. (*Susquehanna Fert. Co. v. Malone*, 73 Md. 268, 25 Am. St. Rep. 595, 9 L. R. A. 737, 20 Atl. 900.) If a nuisance is proven, it is no

defense that reasonable care was taken to prevent it, as that the business from which the nuisance arose was conducted according to the most approved methods. (*Chicago etc. Ry. Co. v. First Meth. Episcopal Church*, 102 Fed. 85; *Laflin etc. Powder Co. v. Tearney*, 131 Ill. 322, 19 Am. St. Rep. 34, 7 L. R. A. 262, 23 N. E. 389; *People v. Detroit White Lead Co.*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735; *People v. Burtleson*, 14 Utah, 258, 47 Pac. 87.) The locality is to be considered, for that which may not be a nuisance may become so if located in a residential portion of a city. (29 Cyc., p. 1157; *Dargan v. Waddil*, 9 Ired. (N. C.) 244, 49 Am. Dec. 421.) A fair test is the reasonableness or unreasonableness of the business in the locality. (*State v. Cantieny*, 34 Minn. 1, 24 N. W. 458; *Exley v. Southern Oil Co.*, 151 Fed. 101; *United States v. Luce*, 141 Fed. 385.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The Lawlor and Kemper addition to Butte comprises the surface ground of the Gambrinus Quartz Lode mining claim which was platted and sold generally for residence purposes. About 1905 plaintiff purchased lot 20, block 2, with a dwelling on it, and ever since has occupied the premises as a residence for himself and family. The defendant Corbin Copper Company became the owner of lots 10, 11, 12 and 18 in the same block, and in 1913 commenced sinking a shaft on lot 18, about fifty feet from plaintiff's residence, and continued the work for a year or more. In furtherance of its purpose the company placed upon its lots a gallows frame, a tramway, a blacksmith-shop, and other structures and machinery necessary to the prosecution of mining operations. This action was brought to recover damages, upon the theory that appellant was maintaining a nuisance which injuriously affected the health and comfort of plaintiff and his family and the value of their property. Certain individuals were joined as defendants, but they were acquitted of liability. The plaintiff prevailed as against the

copper company, and it appealed from the judgment and from an order denying a new trial.

Three questions are submitted for determination: (1) Did the mining operations of the defendant company constitute a nuisance? (2) Is plaintiff estopped by deed from complaining of defendant's operations? (3) Does the evidence justify a judgment for more than nominal damages?

1. Section 6162, Revised Codes, provides: "Anything which [1] is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, \* \* \* is a nuisance." The language of this statute is to be given a common-sense construction. On the one hand, it takes care that a legitimate and useful business or occupation shall not be suppressed on account of some imaginary or trifling annoyance, which offends the over-refined tastes or disturbs the supersensitive nerves of a fastidious person; on the other, it does not permit anyone, whatever his circumstances, to be driven from his home, or compelled to live in it in positive discomfort, in order to accommodate another, in the pursuit of his business which offends the mind and taste of the average individual.

The question of nuisance *vel non* is not to be determined in [2] the abstract. Every case must be considered with reference to its own peculiar facts and circumstances. No one would have the temerity to contend that mining is *per se* a nuisance; but it is elementary that a business otherwise lawful and useful may become a nuisance, by reason of its location or the manner in which it is conducted. Neither a powder magazine nor a stone quarry is of itself a nuisance, but either may become such when located in a populous community or in a residence district. (*Cameron v. Kenyon-Connell Co.*, 22 Mont. 312, 74 Am. St. Rep. 602, 44 L. R. A. 508, 56 Pac. 358; *Longtin v. Persell*, 30 Mont. 306, 104 Am. St. Rep. 723, 2 Ann. Cas. 198, 65 L. R. A. 655, 76 Pac. 699.) Upon the same principle a gas plant (*Judson v. Los Angeles S. G. Co.*, 157 Cal. 168, 21 Ann.

Cas. 1247, 26 L. R. A. (n. s.) 183, 106 Pac. 581), an insane asylum (*Shepard v. Seattle*, 59 Wash. 363, 40 L. R. A. (n. s.) 647, 109 Pac. 1067), a brick kiln (*Face v. Cherry*, 117 Va. 41, 1 Ann. Cas. 1917E, 418, 84 S. E. 10), or a tin-shop (*Dennis v. Eckhart*, 3 Grant Cas. (Pa.) 390), may become a nuisance. Numerous other illustrative cases will be found cited in 29 Cyc. 1165 *et seq.* If the evidence brings appellant's mining operations within the definition given in section 6162 above, it is no defense to say that they were carried on according to approved methods, or that in maintaining the nuisance appellant exercised due care, or that mining is necessary to the industrial life of the particular district. Community benefits cannot be urged as justification for the injury or destruction of private property without compensation. (*Townsend v. Norfolk R. & L. Co.*, 105 Va. 22, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, and note, 4 L. R. A. (n. s.) 87, 56 S. E. 970; *Appeal of Pennsylvania Lead Co.*, 96 Pa. 116, 42 Am. Rep. 534; *Columbus C. & I. Co. v. Tucker*, 48 Ohio St. 41, 29 Am. St. Rep. 528, 12 L. R. A. 577, 26 N. E. 630; *People v. White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.)

The evidence discloses that these mining activities were begun [4] in a residential portion of the city, after it had been built up for residence purposes; that before such time it was a desirable, quiet neighborhood, and well adapted for residence purposes; that the shaft, tramway, hoisting engine, air-compressor, air-containers, blacksmith-shop, and all machinery were in close proximity to plaintiff's dwelling-house; that the inmates of the house were disturbed at all times of the day and night by loud and unusual noises, blasting, ringing of bells, dumping of cars, running of cars over the tramway, rumblings and vibrations of hoisting engines, pumps, air-compressors and other machinery, and periodically by day and night by heavy explosions of dynamite, which awakened the inmates from sleep and jarred and shook the house and furniture; that such noises, vibrations and concussions were a source of great annoyance and discomfort to the inmates of plaintiff's home, and made it unpleasant

and uncomfortable to live in, and caused plaintiff's wife to become nervous and her health to be temporarily injured by reason thereof; that such conditions continued for a year or more, and defendant admits in the answer that such activities will be resumed and continued indefinitely. It is disclosed, further, that plaintiff's property suffered structural injury, and that its value depreciated one-half. Under these circumstances, the trial court did not err in its conclusion that appellant was maintaining a private nuisance.

2. But it is insisted that, even though these activities caused some substantial annoyance and damage, plaintiff cannot be [5] heard, because he is estopped, by the condition of the deed conveying him legal title to his property, from complaining of mining operations by defendant. Whether plaintiff is estopped depends upon the terms of his deed. If it purports to do nothing more than sever the minerals from the superjacent soil and reserve to the grantor the mining rights, it may well be contended that there is implied in the reservation the right in the grantor and in defendant—a grantee from a common source—to employ such means and processes, for the purposes of extracting the ores, as may be reasonably necessary in the light of modern invention. (3 Lindley on Mines, 3d ed., sec. 813.) But the deed in question does more. It is in the usual form, with this addition: "It is understood that only the surface ground of the premises above described is herein conveyed, and that the party of the first part continue the owner of all minerals beneath the surface thereof, with the right to mine and extract the same: Provided, that in the exercise of such mining rights said premises shall not be disturbed, damaged, or interfered with by said party of the first part." Plaintiff's grantor did not see fit to make an unconditional reservation of his mining rights, but voluntarily limited his right to such mining operations as would not disturb, damage or interfere with the plaintiff in the use and occupation of the surface ground embraced in lot 20. The parties to the deed were free to make any lawful contract, and plaintiff may rely with confidence

upon the terms quoted above, which recognize the correlative rights of grantor and grantee, and in effect bind each alike to the observance of the equitable rule expressed by the maxim: "*Sic utere tuo ut alienum non laedas.*"

While plaintiff may not be heard to deny generally appellant's right to utilize its property, he is not estopped by his deed to complain of particular mining operations which disturb or interfere with the quiet and peaceable possession and enjoyment of his own premises, or of acts of the appellant which cause damage to his property.

In their presentation of this case, counsel have assumed that the copper company acquired mining rights, and we have proceeded upon that assumption, though the fact is not alleged in any of the pleadings.

3. No useful purpose would be served in reciting the evidence in detail or in substance. In our opinion it is sufficient to sustain the finding that plaintiff has been damaged to the extent of \$1,250.

The judgment and order are affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

## STATE, RESPONDENT, v. HALL, APPELLANT.

(No. 4,061.)

(Submitted September 9, 1918. Decided September 23, 1918.)

[175 Pac. 267.]

*Criminal Law—Felony—Evidence—Trial—Opening Statement—Jury—Presence of Defendant—Record—Appeal and Error—County Attorney—Argument—Prejudice—Harmless Error—Curing Error.*

*Criminal Law—Felony—Evidence—Inspection of Papers—Statutes.*

1. The provision of section 7138, Revised Codes, that the court may order a litigant to permit his opponent to inspect entries of accounts, papers, etc., in his possession or under his control relating to the merits of the action, refers only to such matters as might be introduced in evidence, and not to *ex parte* statements of a prosecuting witness touching the facts and circumstances surrounding the commission of a crime, reduced to writing by and in possession of the county attorney.

*Same—Dismissal of Action—Trial—Incomplete Opening Statement.*

2. A civil action as well as a criminal prosecution may be dismissed upon the conclusion of the opening statement of counsel, if such statement discloses affirmatively that the plaintiff cannot prevail.

*Same—Incomplete Opening Statement—Dismissal—Proper Refusal.*

3. Refusal to dismiss a criminal action for mere failure of the prosecuting attorney to make mention in his opening statement of the county in which the crime for which defendant was on trial had been committed was proper.

*Same—Opening Statement—Statute—Directory Provision.*

3a. The provision of section 9271, Revised Codes, requiring the county attorney to make an opening statement in a prosecution for crime, held directory merely.

*Same—Admonishing Jury—"Jury."*

4. Until the jury in a criminal cause is completed and sworn, it is not a "jury" within the meaning of section 9301, which requires the trial judge to admonish the jury at each adjournment not to form or express an opinion upon the case until final submission to them.

*Same—Admonishing Jury—Record Imports Verity.*

5. The record on appeal in a criminal cause which disclosed that when an adjournment was taken, "the jury was admonished by the court and placed in charge of the sheriff," etc., was sufficient to disclose compliance with section 9301, Revised Codes, imported verity and could not be impeached by affidavit.

*Same—Admonishing Jury—Curing Error.*

6. Failure of the court to admonish the jury not to form or express any opinion about the merits of the case upon taking an adjournment after the jury had been sworn, was cured by proper admonitions at every subsequent adjournment.

*Same—Settlement of Instructions—Not Part of Trial—Presence of Defendant.*

7. The settlement of the instructions being no part of the "trial" within the meaning of section 9233, Revised Codes, requiring the



presence of one charged with felony, throughout the trial, his absence during such settlement does not constitute reversible error.

Same—Presence of Defendant—Minutes of Court—Construction.

8. Minutes of the court construed and *held* to show that defendant was continuously present in court from 3 P. M. of a certain day when the jury was instructed until 12:50 A. M. of the next day when the verdict was returned, contrary to the contention of the appellant that he was not present when the verdict was delivered.

Same—Appeal—Prejudice.

9. Under section 9415, Revised Codes, prejudice to appellant in a criminal cause cannot be presumed, but must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice.

Same—Remarks of County Attorney—Prejudice not Shown.

10. *Held*, under the above rule, that in the absence of the evidence from the record, objectionable remarks made by the county attorney in his closing argument excepted to as beyond the rules of legitimate advocacy were not sufficient to warrant a reversal of the judgment, since the evidence may have pointed so conclusively to defendant's guilt that no prejudice could have resulted from the statements.

[As to what is deemed to be invasion by the court of the province of the jury, see note in 14 *Am. St. Rep.* 36.]

*Appeal from District Court, Missoula County; Asa L. Duncan, Judge.*

FRANK C. HALL was accused of a felony, and from the judgment and an order denying him a new trial, he appeals. Affirmed.

Cause submitted on briefs of Counsel.

*Messrs. Mulroney & Mulroney*, for Appellant.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

1. Prior to filing the information in this case the county [1] attorney secured from the prosecuting witness a statement of the facts and circumstances surrounding the commission of the alleged offense, and this statement was reduced to writing. Upon application of the defendant the trial court

refused to compel the public prosecutor to furnish a copy of such statement or permit an inspection of it. The provisions of section 7138, Revised Codes, are invoked, and for present purposes we will assume that they are made applicable to criminal cases by section 9279.

Section 7138 provides that the court may, upon notice, order either litigant to permit the other to make an inspection and copy of entries of account, documents or papers in his possession or under his control *which contain evidence* relating to the merits of the action or defense. That these provisions refer exclusively to such entries, documents and papers as might be introduced in evidence is apparent from the next sentence in the section, which reads as follows: "If compliance with the order be refused, the court may exclude the entries of accounts of the book, or the document, or paper from being given in evidence, or if wanted as evidence by the party applying, may direct the jury to presume them to be as he alleges them to be." This is also the construction placed upon similar statutes in other jurisdictions. (*Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; *Silvers v. Junction R. R. Co.*, 17 Ind. 142; *Oro W. L. & P. Co. v. Oroville* (C. C.), 162 Fed. 975.) The *ex parte* statement of the prosecuting witness could not have been introduced as substantive evidence, and, however helpful it might have been to defendant, he was not entitled to it. The statute does not require the state to lay bare its case in advance of the trial.

2. Upon the conclusion of the opening statement of the case, the defendant moved for a dismissal of the action for the failure of the county attorney to include in such statement a reference to the fact that the alleged crime was committed in Missoula county, and error is predicated upon the adverse ruling of the trial court.

It is the rule in civil cases that the court may dismiss an [2] action upon the conclusion of the opening statement, if such statement discloses affirmatively that the party making it cannot prevail. (*Redding v. Puget Sound Iron Works*, 36

Wash. 642, 79 Pac. 308.) The reason for the rule is that it would be an idle waste of time to hear evidence which could not possibly benefit the party offering it. A case illustrating the rule is *Oscanyan v. Arms Co.*, 103 U. S. 261, 26 L. Ed. 539, in which it appeared from the opening statement of counsel for plaintiff that the contract sued upon was void as against public policy. In the case just cited it is assumed that the rule is the same in criminal cases as in civil cases, and we have no doubt that the assumption is correct. If in this instance the opening [3] statement of the county attorney had disclosed affirmatively that the offense charged was committed outside of Missoula county, it would have been idle to proceed, for the court would have been without jurisdiction, but would have had express statutory authority for discharging the jury. (Rev. Codes, sec. 9292.)

If the contention of appellant should be upheld, it would follow that upon the trial of every criminal case the county attorney must, as the first step, make an opening statement complete in every detail, under penalty of dismissal for his failure [3a] in whole or in part. Section 9271 does not undertake to do more than prescribe an orderly procedure for the trial of criminal cases, and section 9272 in effect declares that the provisions of the preceding section are directory merely, and this is the view of other courts upon similar statutes. (*United States v. Sprague*, 8 Utah, 378, 31 Pac. 1049; *Holsey v. State*, 24 Tex. App. 35, 5 S. W. 523.)

3. The trial of this case commenced on March 6 and extended through the 12th. During the first day the regular panel was [4] exhausted, and a recess was taken to secure a special venire. The jury was completed on the afternoon of the 6th, and adjournment was then taken until the 7th. At noon on the 7th a recess was taken until 1:30 P. M. of that day. It is conceded that at each of these three adjournments the trial court instructed the jurors not to converse among themselves, or permit anyone else to converse with them, about the case; but appellant contends that the court omitted to admonish the

jurors not to form or express any opinion upon the case until it was finally submitted, as required by section 9301, Revised Codes, and that because of this omission a new trial should be granted.

The record discloses that when the first recess was taken the jury had not been completed. For this reason the statute has no application. The term "jury," used in section 9301, means a body of men returned from the citizens of a particular district before a court of competent jurisdiction *and sworn to try and determine* by verdict a question of fact. (Sec. 6333, Rev. Codes.)

The record further discloses that when the second adjournment [5] was taken "the jury was admonished by the court and placed in charge of the sheriff," etc. This record is sufficient to disclose compliance with the statute. If it does not speak the truth, the remedy was by motion to have it corrected. As it stands, it imports verity, and cannot be impeached by affidavit. (*Montana Ore Pur. Co. v. Maher*, 32 Mont. 480, 81 Pac. 13; 17 Cyc. 571; 7 R. C. L. 1018; 10 R. C. L. 1028.)

It is further conceded by defendant that at each adjournment [6] taken after the noon recess on the 7th the jury was properly admonished as required by statute; and we have presented then the question: Shall a new trial be granted because of the failure of the court to admonish the jury fully when the noon recess was taken on the 7th? We do not mean to detract in the least from the importance of the statute in question. It was enacted to be observed. Its evident purpose is to secure a true verdict based solely upon all the evidence in the case, and to that end prevent the jury receiving evidence outside the record, prevent interested parties from influencing, or attempting to influence, the jury out of court, and prevent the jurors from forming conclusions from first impressions, or upon the evidence offered by one side only. The jury is made an important factor in our judicial system, upon the theory that the average jury will be constituted of men of average intelligence; and though the statutory admonition should be given at every

adjournment of court during a trial, it would reflect seriously upon the mental capacity and integrity of the jurors in this case to say that any impressions formed from the evidence received during the forenoon of the 7th could not be, and were not, completely removed by the repeated admonitions of the court, thereafter given, that they should not form or express any opinion as to the guilt or innocence of the accused until the cause was finally submitted. Whatever error was committed at the noon recess on the 7th was cured by the subsequent action of the court.

4. Appellant complains that he was not present when the [7] instructions were settled, and if the settlement of the instructions is a part of the trial proper, then error was committed, for the defendant charged with a felony must be present throughout the trial. (Sec. 9233, Rev. Codes.)

The statute determines inferentially that the settlement of the instructions is not a part of the trial, for section 9271 requires that the instructions shall be settled "without the presence of the jury," and the presence of the jury is indispensable to the trial of one accused of a felony. (Sec. 9232.) It follows that, if the instructions can be settled without the presence of the jury, they may likewise be settled without the presence of the defendant. Indeed, the settlement of the instructions is nothing more nor less than the determination of questions of law preliminary to the next step in the trial—the charge to the jury. Upon principle the case of *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026, is authority here.

5. A defendant on trial, charged with the commission of a [8] felony, must be personally present in court when the verdict is returned (section 9320), and it is held quite generally that the fact of his presence must appear from the record (*State v. De Lea*, 36 Mont. 531, 93 Pac. 814). It is the contention of appellant that the record does not disclose that he was present when the verdict was received. The clerk's minutes recite that the taking of testimony was concluded on Saturday, March 10; that court then adjourned until March 12 at 9:30 A. M.; that on March 12 the instructions were settled, and about

3 P. M. of that day, "the defendant being present in court, \* \* \* the trial of said cause was resumed. The jury was instructed by the court, and after argument by respective counsel the cause was submitted to the jury, who retired in charge of a sworn officer to deliberate upon a verdict. The jury subsequently returned into court at 12:50 A. M., March 13, 1917, and announced that they had agreed upon a verdict, and presented said verdict to the court, which is as follows, to-wit," etc. Construed fairly, this language must be held to mean that the defendant was present in court continuously from 3 P. M. until after the verdict was returned. It is equivalent to saying: "The defendant being present in court, each of the following proceedings was had: (a) The jury was instructed; (b) the cause was argued and submitted: (c) the jury retired to consider of their verdict; and (d) the jury returned their verdict as follows," etc. (*McCoggle v. State*, 41 Fla. 525, 26 South. 734; *Lawson v. Territory*, 8 Okl. 1, 56 Pac. 698.)

6. Exception is taken to certain remarks of counsel for the [9, 10] state in his closing argument to the jury. We do not approve the language employed by counsel, but the evidence is not brought to this court, and we are not, therefore, in position to say that counsel so far departed from the rules of legitimate advocacy as to require a reversal of this judgment. It may be that the evidence points to defendant's guilt so conclusively that no possible prejudice could have resulted from the objectionable remarks. Prejudice is not presumed. It must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice. The rule which formerly prevailed in this jurisdiction—"Error appearing, prejudice will be presumed"—was superseded by the provisions of section 9415, which command this court to give judgment without regard to technical errors or defects which do not affect the substantial rights of the parties.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

**SHERRIS, APPELLANT, v. NORTHERN PACIFIC RY. CO.  
ET AL., RESPONDENTS.**

(No. 3,918.)

(Submitted June 17, 1918. Decided September 30, 1918.)

[175 Pac. 269.]

***Personal Injuries—Minors—Railroad Crossings—Automobile  
Passengers—Contributory Negligence—Harmless Error.***

**Personal Injuries—Minors—Contributory Negligence.**

1. *Held*, under the rule that after a child has reached the age of fourteen years he is presumed capable of contributory negligence, that a minor within a few months of majority who had supported himself since he was fifteen years old doing farm work and acting as a chauffeur, could properly be charged with such negligence in his action for personal injuries sustained in an automobile accident while riding in the machine as the guest of the driver.

**Same—Imputed Negligence.**

2. *Quaere*: Where personal injury is suffered by one riding in an automobile as the guest of the driver, is the negligence of the latter, who does not sustain the relation of employee or agent to the former, imputable to the guest?

[As to negligence of driver of automobile as imputable to occupant, see note in *Ann. Cas.* 1916E, 268.]

**Same—Duty to Avoid Danger—Contributory Negligence.**

3. Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him because of the culpable negligence of another, and therefore plaintiff in a personal injury action based on such negligence must show that he did so exercise his intelligence at the time of the accident.

**Same—Railroad Crossings—Automobiles—Guest of Driver—Contributory Negligence.**

4. Plaintiff who, as the guest of the driver of an automobile, was riding on the front seat of the machine when approaching a railroad crossing, was required to exercise his intelligence to avoid the dangers incident thereto, and could not blindly rely upon the unaided care and vigilance of the driver for his safety without assuming the consequences of his negligence.

**Same—Imputed Negligence—Instructions—Harmless Error.**

5. Where the jury properly found that plaintiff was guilty of contributory negligence and therefore could not recover damages, the giving of an erroneous instruction touching the doctrine of imputed negligence was nonprejudicial.

*Appeal from District Court, Missoula County; Asa L. Duncan, Judge.*

ACTION by R. O. Sherris, an infant, by W. C. Sherris, his guardian *ad litem*, against the Northern Pacific Railway Com-

pany and another. Judgment for defendants and plaintiff appeals. Affirmed.

*Messrs. Maury, Templeman & Davies* and *Mr. Gilbert J. Heyfron*, for Appellant, submitted a brief; *Mr. J. O. Davies* argued the cause orally.

The question of the imputed negligence of the driver of an automobile to the passengers in the car and those riding by invitation has been before the courts of this country in the last few years more frequently than any other question of the law of negligence, and with the exception of New York, and perhaps one or two other states following the New York rule, we believe we are justified in saying that the courts of this country are unanimous in holding that the negligence of the driver of an automobile, where the relation of employer and employee or agent does not exist, can never be imputed to the passenger, whether the passenger be minor or adult. (*Chickasha St. Ry. Co. v. Marshall*, 43 Okl. 192, 141 Pac. 1172; *Tonseth v. Portland Ry., Light & Power Co.*, 70 Or. 341, 141 Pac. 868; *Birmingham-Tuscaloosa Ry. & Utilities Co. v. Carpenter*, 194 Ala. 141, 69 South. 626; *Hackworth v. Ashby*, 165 Ky. 796, 178 S. W. 1074; *Perkins v. Galloway*, 194 Ala. 265, L. R. A. 1916E, 1190, 69 South. 875; *Johnston v. Delano*, 175 Iowa, 498, 154 N. W. 1013; *Igino v. Metropolitan St. Ry. Co.* (Mo. App.), 179 S. W. 771; *Weber v. Philadelphia & R. Co.*, 88 N. J. L. 398, 96 Atl. 54; *Hunt v. North Carolina R. Co.*, 170 N. C. 442, 87 S. E. 210; *Chicago & E. R. Co. v. Biddinger*, 61 Ind. App. 419, 109 N. E. 953; *Lawrence v. Sioux City*, 172 Iowa, 320, 154 N. W. 494; *City of Louisville v. Heitkemper's Adm.*, 169 Ky. 167, 183 S. W. 465; *Sanders v. Taber*, 79 Or. 522, 155 Pac. 1194; *Denton v. Missouri K. & T. Ry. Co.*, 97 Kan. 498, 155 Pac. 812; *Siever v. Pittsburgh, C. C. & St. L. R. Co.*, 252 Pa. St. 1, 97 Atl. 116; *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Collins' Exrs. v. Standard Acc. Ins. Co.*, 170 Ky. 27, Ann. Cas. 1917D, 59, 185 S. W. 112; *Hermann v. Rhode Island Co.*, 36 R. I. 447, 90 Atl. 813.)



*Messrs. Gunn, Rasch & Hall* and *Mr. William F. Wayne*, for Respondents, submitted a brief; *Mr. E. M. Hall* argued the cause orally.

The doctrine of imputed negligence has been the law of this state for over twenty-two years, and during that period it has never been modified or even criticised by any subsequent decision of this court, nor has the legislature ever seen fit to change the law by legislative enactment. (*Whittaker v. City of Helena*, 14 Mont. 124, 43 Am. St. Rep. 621, 35 Pac. 904.) The Michigan and Wisconsin cases, followed by this court in the *Whittaker Case*, have been reaffirmed and followed in numerous cases in those states from that time down to the present. (*Ritger v. Milwaukee*, 99 Wis. 190, 74 N. W. 815; *Olson v. Luck*, 103 Wis. 33, 79 N. W. 29; *Lightfoot v. Winnebago Traction Co.*, 123 Wis. 479, 102 N. W. 30; *Lauson v. Town of Fond du Lac*, 141 Wis. 57, 135 Am. St. Rep. 30, 25 L. R. A. (n. s.) 40, 123 N. W. 629; *Mullen v. Owosso*, 100 Mich. 103, 43 Am. St. Rep. 436, 23 L. R. A. 693, 58 N. W. 663; *Kneeshaw v. Detroit United Ry.*, 169 Mich. 697, 135 N. W. 903; *Granger v. Farrant*, 179 Mich. 19, 51 L. R. A. (n. s.) 453, 146 N. W. 218; *Kane v. Boston Elevated Ry. Co.*, 192 Mass. 386, 78 N. E. 485; *Fogg v. New York etc. R. R. Co.*, 223 Mass. 444, 111 N. E. 960.)

Many cases hold that where the plaintiff and the driver were engaged in a common purpose or enterprise, as they were in this case, then the negligence of the driver is imputable to the plaintiff. This appears to be the general rule, and where, under such circumstances, the plaintiff's previous experience is such that he should have knowledge of the dangers incident to driving such vehicle or car in the manner or under the conditions existing, and voluntarily elects to ride and trusts to the other man's driving, the law seems to be settled that he assumes the risk of injury from the negligence of the driver and that such negligence is imputed to him. (*Rebüllard v. Minneapolis etc. Ry. Co.*, 216 Fed. 503, L. R. A. 1915B, 953, 133 C. C. A. 9; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334; *Beaucage v. Mercer*, 206 Mass. 492, 138 Am. St. Rep. 401, 92 N. E. 774;

*Washington & O. D. Ry. Co. v. Zell's Admr.*, 118 Va. 755, 88 S. E. 309.)

A person riding with another, who is driving, must also exercise ordinary care to discover danger and avoid injuries at railway crossings, and if he fails to do so his own contributory negligence will bar a recovery. (*Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 29 L. R. A. (n. s.) 924, 103 C. C. A. 135; *Read v. New York Central etc. R. Co.*, 123 App. Div. 228, 107 N. Y. Supp. 1068; *Cable v. Spokane & Inland Empire R. Co.*, 50 Wash. 619, 23 L. R. A. (n. s.) 1224, 97 Pac. 744; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334; *Pouch v. Staten Island Midland Ry. Co.*, 142 App. Div. 16, 126 N. Y. Supp. 738; *Colorado & S. Ry. Co. v. Thomas*, 33 Colo. 517, 3 Ann. Cas. 700, 70 L. R. A. 681, 81 Pac. 801; *Crosby v. Maine Central R. R. Co.*, 113 Me. 270, L. R. A. 1915E, 225, 93 Atl. 744 (a boy twelve years old); *Bush v. Union Pac. R. Co.*, 62 Kan. 709, 64 Pac. 624 (a girl seventeen years old); *Missouri K. & T. Ry. Co. v. Bussey*, 66 Kan. 735, 71 Pac. 261; *Dean v. Pennsylvania Ry. Co.*, 129 Pa. St. 514, 15 Am. St. Rep. 733, 6 L. R. A. 143, 18 Atl. 718.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Action for damages for a personal injury caused by a collision of a train of the defendant railway company with an automobile in which plaintiff was being driven by Orville Black. The complaint alleges that the collision was caused by the negligence of the defendant McCann, the engineer, in pushing several cars by means of a switch engine at an excessive rate of speed over the defendant company's track, designated as the east-bound main track, where it crosses Harris Street in the company's yards in the city of Missoula, without ringing the bell or sounding the whistle, there being no flagman at the crossing to warn persons approaching along the street, and the cars not being provided with a lookout or a warning light. The defendants, denying all the acts and omissions charged as negli-

gence, alleged that the plaintiff was guilty of negligence which contributed to his injury in this: (1) That Orville Black, who was driving the automobile, knew that the view along the track in the direction from which the train came was obstructed by a car standing on a parallel track over which he must pass to reach the crossing where the collision occurred; that he drove the automobile at a high rate of speed, without stopping it or reducing its speed, or taking any precaution to ascertain whether a train was approaching, and that the collision was caused by Black's negligence, which must be imputed to the plaintiff; and (2) that plaintiff himself was guilty of contributory negligence in permitting Black to approach the crossing as he did, without giving him any warning or making any protest until it was too late to avoid the collision. Upon these defenses plaintiff joined issue by reply. The trial resulted in a judgment for the defendants. The plaintiff has appealed.

The contention is made by counsel in his behalf that the court erred in submitting to the jury instructions which in effect told them that, if they should find that Black was guilty of negligence, they should return a verdict for the defendants, thus recognizing the doctrine of imputed negligence. Counsel argue that the doctrine can have no application to this case, because the plaintiff was a minor when the accident occurred. To sustain this contention they cite and rely upon the decision of this court in *Flaherty v. Butte Electric Ry. Co.*, 40 Mont. 454, 135 Am. St. Rep. 630, 107 Pac. 416. They also contend that the rule that the negligence of a driver of a vehicle is to be imputed to a person riding with him as his guest, when the driver does not sustain the relation toward the guest of employee or agent is unsound, and should be repudiated by this court, notwithstanding the early decision in *Whittaker v. City of Helena*, 14 Mont. 124, 43 Am. St. Rep. 621, 35 Pac. 904, in which the rule was recognized and applied. Both contentions must be overruled.

At the time of the accident, plaintiff was within a few months [1] of twenty-one years of age. He had been permitted by

his father to maintain himself from the time he had attained the age of fifteen years. He had lived away from home, wherever he could find employment, earning wages by doing ordinary farm work, by feeding a threshing machine during the threshing season, by breaking horses, and by performing services for his employer as a chauffeur. The general rule is that after a child has reached the age of fourteen years he is presumed, as a matter of law, to be capable of contributory negligence. (White's Supp. to Thompson on Neg., sec. 315; 20 R. C. L., p. 128.) The underlying principle of the *Flaherty Case* is that since a child of tender years—one under three years of age—has not the capacity to commit his person to the custody of another, he is not chargeable with the negligence of another who occupies toward him the relation of parent or legal custodian, however gross such negligence may be. The plaintiff does not come within the rule of this case, but is subject to the general rule above stated.

It is true that the doctrine upon which the decision in the [2] *Whittaker Case* is based has been repudiated as unsound both in England and by the courts of almost all the states in the Union. For a full discussion of the subject, with a review of both English and American cases, reference may be had to the leading case of *Shultz v. Old Colony St. Ry. Co.*, 193 Mass. 309, 118 Am. St. Rep. 502, 9 Ann. Cas. 402, 8 L. R. A. (n. s.) 597, 79 N. E. 873. In that case the court, speaking through Mr. Justice Rugg, stated the rule thus: "With some modifications in its application to particular cases, the general rule is that, where the injured person and the driver do not occupy the position of master and servant, passenger and carrier, parent and child, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver, and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is not precluded from recovery against the third person by reason of the negligence of the driver." For the purposes of this case, however, we are not required to enter upon

[3] a review of the authorities to determine whether the *Whitaker Case* should be overruled. Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him. When, therefore, a plaintiff asserts the right of recovery on the ground of culpable negligence of the defendant, he is bound to show that he exercised his intelligence to discover and avoid the danger, which he alleges was brought about by the negligence of the defendant. In recognition of this general rule, and in order to meet the alternative presented by the defendants' second defense, the court also submitted instructions which authorized the jury to inquire whether, in view of the circumstances disclosed by the evidence, the plaintiff himself failed to exercise the care and diligence of an ordinarily prudent person, and for this reason was guilty of contributory negligence, and directed them, if they should so find, to return their verdict for the defendants.

Counsel do not question the correctness of these instructions in point of law; nor do they suggest that they were not properly submitted. Indeed, in face of the general rule referred to above, their correctness cannot be questioned; for though the [4] negligence of Black should not be imputed to the plaintiff, still the plaintiff was not absolved from the duty of using ordinary care for his own safety. Though the guest of Black, he could not close his eyes to the danger which might be encountered at the crossing, in blind reliance upon the unaided care and vigilance of Black, without assuming the consequences of a disregard for his own safety. (*Bresee v. Los Angeles T. Co.*, 149 Cal. 131, 5 L. R. A. (n. s.) 1059, 85 Pac. 152; *Parmenter v. McDougall*, 172 Cal. 306, 156 Pac. 460; *Brickell v. New York C. & H. R. R.*, 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; *Shultz v. Old Colony St. Ry. Co.*, *supra*; *Dean v. Pennsylvania R. Co.*, 129 Pa. 514, 15 Am. St. Rep. 733, 6 L. R. A. 143, 18 Atl. 718; *Nesbit v. Garner*, 75 Iowa, 314, 9 Am. St. Rep. 486, 1 L. R. A. 152, 39 N. W. 516; *Davis v. Chicago Ry.*, 159 Fed. 10, 16 L. R. A. (n. s.) 424, 88 C. C. A. 488; *Brommer v. Pennsylvania Ry. Co.*, 179 Fed. 577, 29 L. R. A. (n. s.) 924,

103 C. C. A. 135; *Canter v. City of St. Joseph*, 126 Mo. App. 629, 105 S. W. 1; *Bush v. Union Pac. Ry. Co.*, 62 Kan. 709, 64 Pac. 624; *Cable v. Spokane & Inland Empire Ry. Co.*, 50 Wash. 619, 23 L. R. A. (n. s.) 1224, 97 Pac. 744; *Wentworth v. Waterbury*, 90 Vt. 60, 96 Atl. 334; *Shearman & Redfield on Neg.*, sec. 66a.)

The testimony introduced by the plaintiff is best illustrated by a brief description of the yards and the conditions existing at the time of the collision. The collision occurred in the evening, after dark. The main line of the road extends east and west, and consists of two tracks, designated as the east-bound main track and the west-bound main track; the latter being north of the former. In approaching the east-bound main track, one is obliged to cross seven other tracks, besides the west-bound main track. These may be designated as tracks 1, 2, 3, 4, 5, 6 and the caboose track; the latter being thirty-two and one-half feet distant from the east-bound main track. One passing over tracks 1 and 2 cannot readily observe the movements of cars or engines in the yards toward the west, because of a high platform used for icing cars, which extends to the west for several hundred feet along the north side of track 3. After passing over this track the view of the east-bound main track is open for many hundred feet to the west, except when it may be obstructed by cars standing on one or more of the intervening tracks. At the time of the accident there were no cars on any of these tracks, save one or two cabooses standing on the caboose track, the east end of the nearest being about twenty-seven feet west of Harris Street. After passing track 3, the view toward the west was wholly unobstructed, except for these cabooses. There was an arc-light suspended about thirty feet high over Harris Street, near the north rail of the caboose track. The yard was dark, except so far as objects were made visible by this light. From a point about midway between track 6 and the caboose track, and about forty-three feet from the east-bound main track, the view was open beyond the east end of the nearest caboose for a distance of eighty-six feet. From

the north rail of the caboose track, the view was open for a distance of 155 feet. From the south rail, the view was open for some 380 feet. The ground declines slightly from about track 6 all the way to the east-bound main track. At this time it was covered with snow and ice. As to the correctness of this statement there was no substantial conflict, except that plaintiff testified that there were two cabooses standing on the caboose track, whereas the defendants' evidence showed that there was only one. The engineer, McCann, was engaged in turning cars which belonged to local trains and placing them on their appropriate tracks. In the process of doing this the cars were moved toward the west along the east-bound main track, and from that switched over to the adjoining tracks. The plaintiff testified that he sat in the front seat of the automobile by the side of Black; that Black drove into the yards at the rate of six or eight miles an hour; that the wheels of the automobile were not provided with chains; that when it reached track 6, Black shut off the power and allowed the automobile to drift along in high gear; that it was making no noise; that, as they approached the main line, both he and Black kept a constant lookout, glancing to the right and left; that he could not see a train approaching from the west until he had passed the caboose track; that he heard no noise of any kind; that as they passed this track he glanced to the right, then to the left, and again to the right; that Black did the same; that as he glanced to the right the second time he discovered the train coming from the west on the east-bound main track; that it was made up of several cars, two of which were being pushed by an engine; that there was no person on the front of the foremost car, nor any light; that the bell of the engine was not rung, nor the whistle sounded; that the train was approaching at a rate about twice as fast as Black was driving, and that, when he saw the train, Black was looking to the left; that he called to Black, who at once put on the brake to stop, but that the automobile skidded along until it came so near the east-bound track that it was struck by the step of the front car and pushed around until it

faced to the east, with the result that plaintiff, in the act of jumping to save himself, was thrown to the ground and injured. The testimony of Black was substantially the same as that of plaintiff, except that he stated that he was driving at the rate of eight or ten miles an hour; that the train was fifteen or eighteen feet from the crossing when he first saw it, moving at about the same rate as that at which he was driving; that a Ford automobile, such as he was driving, could ordinarily be brought to a stop in ten or twelve feet, but that under the conditions then existing he could not say what distance was required.

The testimony of the defendants' witnesses was to the effect that the automobile was going at about the same rate as the train, or a little faster, and that it reached the crossing at the same time the train did; that when the train left the switch-track to the west, to come upon the east-bound main track, the engineer, McCann, sounded the whistle; that the bell was rung from then until the collision occurred; that two switchmen were riding on the front steps of the front car, both of whom carried lighted lanterns; that the automobile was observed by them when it was about forty feet from the crossing, and that upon a signal from one of them the engineer again sounded the whistle and turned on the air; that the automobile proceeded until it was struck by the front step of the car. The evidence of these switchmen showed that, when the train came to a stop, the automobile, after it was pushed around by the car-step, had proceeded in the same direction in which the train was going for a distance of forty-two feet before it came to a stop.

Upon the assumption that the evidence of the plaintiff made out a case for the jury as to whether the defendants were guilty of negligence, the verdict upon the whole case indicates that they reached one of three different conclusions: (1) That the defendants were not guilty of any negligence; (2) that, though they were, Black was guilty of contributory negligence, which was properly imputed to the plaintiff; or (3) that the plaintiff was guilty of contributory negligence. It cannot be deter-



mined, of course, whether the jury reached the first conclusion indicated or not. In view of all the circumstances, it was within the province of the jury to reject entirely the evidence of both Black and the plaintiff, and accept that of the defendants. If, however, they considered the question of contributory negligence at all, the presumption becomes necessary that they found the plaintiff himself guilty, and made this finding the basis of their verdict. For, the accounts of plaintiff and Black agreeing in all essential particulars and it appearing that plaintiff was fully aware of the danger, had the same opportunity as Black to observe whether a train was approaching, and relied upon his own efforts to protect himself from harm just as did Black, it seems clear that the jury could not have found Black guilty, and the plaintiff not guilty. Upon this theory the finding of the jury was clearly correct, and should be upheld, [5] though it be conceded, as we have done, that the doctrine of imputed negligence, as approved in the *Whittaker Case*, *supra*, is unsound, and that the trial court erred in instructing the jury as it did. The error thus committed could not have prejudiced plaintiff's rights, and does not justify a reversal of the judgment. The case falls within the rule of the statute which forbids this court to reverse a judgment because of any error or defect in the proceedings not affecting the substantial rights of the parties. (Rev. Codes, sec. 6593; *Eadie v. Eadie*, 44 Mont. 391, Ann. Cas. 1913B, 479, 120 Pac. 239; *Robinson v. Helena L. & Ry. Co.*, 38 Mont. 222, 99 Pac. 837; *Shandy v. McDonald*, 38 Mont. 393, 100 Pac. 203.)

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

CASES DETERMINED  
IN THE  
SUPREME COURT  
AT THE  
OCTOBER TERM, 1918.

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THE HON. THEODORE BRANTLY, Chief Justice.

*THE HON. SYDNEY SANNER, THE HON. WILLIAM L. HOLLOWAY, †THE HON. WILLIAM T. PIGOTT,	}	Associate Justices.
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IN RE O'KEEFE.

(No. 4,164.)

(Submitted June 28, 1918. Decided October 7, 1918.)

[175 Pac. 593.]

*Attorneys—Disbarment—Deceiving Court—Giving False Testimony—Defenses.*

**Attorneys—Disbarment—Deceiving Court—False Testimony.**

1. *Held*, that an attorney who testified at a divorce proceeding that the defendant was insane at the time he entered into the marriage contract, although he had himself advised the marriage and knew that he was competent, was guilty of an attempt to deceive the trial court and merits disbarment.

**Same—Deceiving Court—False Testimony—Defenses.**

2. Where an attorney is shown to have knowingly and willfully testified falsely to aid a litigant in attempting to establish a baseless claim, the fact that the trial court did not believe but rejected his testimony is no defense in a proceeding for his disbarment under a charge that he attempted to deceive the court.

[As to disbarment of attorneys, causes and proceedings therefor, and the power of courts to disbar, see note in 95 Am. Dec. 333; 45 Am. St. Rep. 71.]

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\*Resigned October 25, 1918.

†Appointed November 14, 1918, to serve unexpired term of Associate Justice Sydney Sanner.

DISBARMENT proceedings against R. E. O'Keefe, an attorney.  
Judgment of disbarment.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the Prosecution; *Mr. Moody* argued the cause orally.

*Mr. C. B. Nolan*, for Accused, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Proceeding on the complaint of the attorney general against R. E. O'Keefe, an attorney admitted to practice in this state, accusing him of unprofessional conduct, and asking that he be disbarred. When the issues were made up, the court appointed C. A. Spaulding referee to hear the testimony and report the same, together with his findings of fact and his conclusions of law. The original complaint contained one count. During the course of the proceeding it was amended by the addition of a second count. The evidence submitted at the hearing was not directly relevant to the charge made in the first count. The referee therefore disregarded the first count, found upon the issues tendered by the second, and made his report accordingly. The substance of the charge in it is the following: That O'Keefe violated his oath as an attorney, and was guilty of unprofessional conduct, in that, on or about May 21, 1917, in an action then pending in the district court of Blaine county, wherein Elda O'Malley was plaintiff and Patrick H. O'Malley was defendant, one issue joined by the pleadings—of which O'Keefe had knowledge—was whether the said Patrick H. O'Malley was on October 2, 1915, at the time of his marriage to Elda O'Malley, then Elda Sharpless, insane to such an extent as to be incapable of entering into a marriage contract; that said action was brought on for trial in that court on May 21, 1917, before Honorable W. B. Rhoades, Presiding Judge, sitting without a jury; that O'Keefe was called and sworn as a witness, and tes-

tified during the trial; that, well knowing and believing that the defendant O'Malley was not at the time of his marriage so far insane and mentally deranged as to be incapable of entering into a marriage contract, he testified that he knew that O'Malley was insane, with the purpose and intent of deceiving the court and inducing the presiding judge to believe that O'Malley was incapable of entering into a marriage contract. The referee made special findings of fact, the effect of which is that O'Keefe is guilty as charged, and recommended that he be disbarred from practicing as an attorney and counselor in this jurisdiction. After a careful review of the large volume of evidence submitted at the hearing before the referee, we have concluded that it fully supports his findings and that his recommendation should be adopted. The propriety of our conclusion will be made apparent by a brief reference to some of the more salient parts of the evidence.

For several years prior to the fall of 1915 the accused and [1] Dr. O'Malley, a practicing physician, both resided at Chinook, in Blaine county, and were intimate friends. Dr. O'Malley was a bachelor. During the fall of that year he became somewhat mentally deranged, his condition being manifested by groundless fears entertained by him that he was about to suffer injury at the hands of some person or persons in the community. In a measure he lost interest in his practice and to some extent neglected it. He was advised by the accused that, if he would get married and establish a home, he would recover his mental balance and become fully restored to his normal condition. Elda Sharpless, who was then employed in the local telephone exchange, was an intimate friend of both the accused and Dr. O'Malley. The accused suggested to Dr. O'Malley that Miss Sharpless would make him a suitable wife and by persuasion induced him to agree to marry her. Having obtained Dr. O'Malley's consent to do so, the accused sought out Miss Sharpless and arranged for an interview between her and Dr. O'Malley. This occurred on October 2. The result was an agreement between them to be married immediately.

Thereupon the accused accompanied them to Havre, in Hill county, where they were married. The marriage proved unhappy from the beginning. Indeed, the evidence tended to show that it was never consummated by cohabitation between the parties, and that Dr. O'Malley soon compelled his wife to leave his home. Thereafter the wife brought an action for separate maintenance on the ground of desertion. As one of his defenses to the action, Dr. O'Malley interposed a counterclaim demanding an annulment of the marriage, on the ground that he was wholly incompetent to enter into the marriage contract with the plaintiff. At the trial in May, 1917, the accused was one of the principal witnesses called by Dr. O'Malley to establish his want of capacity. In response to inquiries by counsel, he testified without explanation or qualification that he knew that at the time of the marriage Dr. O'Malley was insane. At the hearing before the referee he admitted that he had so testified. He stated further that when he advised the marriage he was of the opinion that Dr. O'Malley was competent; that otherwise he would not have given the advice he did; that he gave his evidence at the trial without qualification as he did, because he was not asked to state how he desired his statement to be understood; and that, if he had thought it would be understood to mean that Dr. O'Malley was not fully competent to contract the marriage, he would have elaborated and explained it. That he had ample opportunity to do this, but failed to improve it, however, is shown by the following excerpt from his cross-examination during the trial. He was questioned by Mr. Hurd, one of counsel for the plaintiff, and gave answer as follows: "Q. Do you mean to tell this court that, knowing a man was insane, you would still advise him to get married? A. I am not telling the court anything. I made the statement that I did so advise him." When we recall the fact that he knew that Dr. O'Malley was seeking an annulment of the marriage on the ground that he was incompetent, that he had been called as a witness to establish the alleged incompetency, and that he did not believe at the time that Dr. O'Malley

was incompetent, we are forced to the conclusion that, in answering the question put to him by Mr. Hurd as he did, he was fencing to avoid any explanation. The conclusion by the referee that his purpose was to deceive the court is thus fully sustained.

Counsel for the accused contends that, when he had answered [2] truthfully the questions put to him, his duty was fully discharged, and that he would not have been permitted to express an opinion as to whether Dr. O'Malley was competent to contract the marriage if he had attempted to do so, because this would have violated the rule of evidence that a witness may not express an opinion on the ultimate fact which is to be found by the court. It is sufficient answer to this to say that if the accused had truthfully informed defendant's counsel, before he was called, of the condition of Dr. O'Malley's mind, he doubtless would not have been called. In other words, he was not under compulsion to testify as he did. He cannot allege the technical rule referred to by counsel to exculpate himself from an apparently deliberate purpose to practice deceit upon the court in bolstering up a ground for the relief alleged by the defendant, which by his own admission at the hearing by the referee he knew did not exist. Nor is he aided by the fact that the court rejected his testimony in finding that Dr. O'Malley was competent.

That the conduct of the accused justifies an order of disbarment cannot be questioned. Subdivision 5 of section 6393 of the Revised Codes is broad and comprehensive. It was clearly intended by the legislature in enacting it to include any course of conduct by an attorney disclosing moral obliquity and dishonesty rendering him unworthy of the privilege of practicing law. A character for honesty and integrity is as necessary, to justify his retention of the privilege after he has acquired it, as it was to acquire it in the first place; and when his conduct is such that he has forfeited his right to the confidence of the public, he has forfeited his right to the privilege also. A man cannot be dishonest as an individual and at the same time

honest as a lawyer. It is not possible to distinguish between the man as an individual and a man as a lawyer; and when he reaches the point where he is ready, as a witness, knowingly and willfully to aid a litigant to establish a baseless claim, he is no longer worthy to be a member of the honorable profession to which he belongs. Courts are instituted to administer justice, as near as may be. The office of the lawyer is to aid them in the exercise of this high function; and when he fails in the duty which he thus owes to the courts, he forfeits the privilege which has been accorded him.

The judgment of the court is that R. E. O'Keefe be removed from his office as attorney and counselor at law, and that his name be stricken from the roll.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

Rehearing denied October 23, 1918.

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ALLEN ET AL., APPELLANTS, v. CITY OF BUTTE, RESPONDENT.

(No. 3,928.)

(Submitted September 13, 1918. Decided October 7, 1918.)

[175 Pac. 595.]

*Cities and Towns—Special Improvements—Notice—Publication—Assessments—Payment—Statutes—Initiative and Referendum.*

*Special Improvements—Notice—Publication—Sufficiency.*

1. Publication of a notice of intention to create a special improvement district which contained the proper reference to time and place for hearing objections to its final adoption, *held* to have been in substantial compliance with section 3397, Revised Codes.

*Same—Statutes—Assessments—Payment.*

2. *Held*, that the provisions of section 3385, Revised Codes, referring to special improvements to be paid for in cash upon its completion, and those of section 3396, under which payment is to be made upon the installment plan covering a period of years, are not inconsistent.

**Same—Assessment—Payment.**

3. Where the city council adopts the plan of payment provided in section 3396, Revised Codes, the entire cost of the special improvement may be charged to the property.

[As to property subject to special assessment, see note in Ann. Cas. 1915D, 384.]

**Same—Initiative and Referendum—When Inapplicable.**

4. The initiative and referendum apply only to matters of general legislation, in which all qualified electors of a city are interested, not to local matters, such as the creation of a special improvement district, in which only its inhabitants or property owners are interested.

**Same—Jurisdiction to Order Improvement.**

5. Since section 3373, Revised Codes, does not provide the manner in which the city council shall make manifest its decision that the construction of a sewer was necessary for sanitary purposes, the question of jurisdiction in the council to proceed with its construction is not presented where plaintiff does not allege in his complaint that it did not, by a vote of the majority of its members, make such decision.

**Same—Assessments—Lien—Damages.**

6. Where the city council had acquired jurisdiction to order a special improvement and levy the assessment to pay for it, the assessment became a lien against the property benefited by it from the date the assessment became due, not affected by the circumstance that plaintiffs had recovered judgments against the city for damages caused by the improvement.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

SUIT by Coleman J. Allen and others against the City of Butte. From a judgment dismissing the complaint, plaintiffs appeal. Affirmed.

*Mr. Peter Breen and Messrs. Nolan & Donovan, for Appellants, submitted a brief; Mr. Breen argued the cause orally.*

*Messrs. J. A. Poore, John A. Groeneveld, Thos. D. Long and Louis F. Lorenz, for Respondent, submitted a brief; Mr. Poore argued the cause orally.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On July 22, 1908, the city council of Butte adopted Council Resolution 762, for the creation of Special Improvement Dis-



trict No. 70, and for the grading of the streets and the construction of a sanitary sewer within the boundaries of the district. Section 4 designated July 29 as the time for hearing objections "to the final adoption of this resolution," and section 5 provided for the publication of notice. On July 29 the council finally adopted the resolution, no objection thereto having been made. On August 6, Ordinance 849A was passed and approved, by the terms of which it was ordered that Antimony Street, within District 70, be graded according to the established grade of the city, and that a sanitary sewer of eight-inch concrete pipe be laid in said street within the district. The ordinance provided for payment on the installment plan and for special assessments to meet the expense. Thereafter the improvements were made, and special improvement warrants delivered in payment. On February 3, 1909, Council Resolution 800 was finally adopted, after notice, and this resolution levied a special tax against the property of the district affected, to meet the installment due in 1909. Several of the property owners refused to pay the special assessment and united in instituting this suit to restrain the city from selling their property to satisfy the delinquent tax. The city prevailed, and plaintiffs appealed from the judgment dismissing their complaint.

The proceedings of the city were governed by sections 3367, 3369-3389, and 3396-3412, Revised Codes. These statutes have long since been repealed, and no useful purpose can be served by an extended discussion of their provisions.

1. Council Resolution 762 shows upon its face that it was intended to be a resolution of intention to create a special improvement district, and not a resolution which in itself created the district upon its adoption July 22, 1908. This brings the case clearly within the rule adverted to in *Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544, and distinguishes it from *Cooper v. City of Bozeman*, 54 Mont. 277, 169 Pac. 801. [1] The publication of the resolution, which contained the proper reference to the time and place for hearing objections

to the final adoption of it, was a substantial compliance with the statute. (Sec. 3397.)

2. Resolution 762 designated the character of the improvements contemplated, with sufficient particularity. (*Mansur v. City of Polson*, 45 Mont. 585, 125 Pac. 1002.)

3. There is not anything inconsistent between the provisions [2] of sections 3385 and 3396. The former section refers to improvements to be paid for by a single payment—in other words, the work to be paid for in cash immediately upon its completion; whereas, section 3396 refers to public improvements to be paid for upon the installment plan, covering a [3] period of years. Since the council adopted the latter plan, they were authorized to charge the entire cost to the property.

4. The initiative and referendum apply only to matters of [4] general legislation, in which all the qualified electors of the city are interested, and not to matters of purely local concern, such as the creation of a special improvement district, in which only the inhabitants or property owners are interested. (*Carlson v. City of Helena*, 39 Mont. 82, 17 Ann. Cas. 1233, 102 Pac. 39.)

5. It is argued in the brief of counsel for appellants that the [5] city council did not by a vote of a majority of its members decide that the construction of the sewer was necessary for sanitary purposes, and the doctrine of *Stadler v. City of Helena*, 46 Mont. 128, 127 Pac. 454, is invoked in behalf of the contention that the city did not acquire jurisdiction to proceed with the creation of the district. In the *Stadler Case* it was alleged in the complaint that “the city council did not, by a vote of the majority of its members, decide that the construction of said sewer was necessary for sanitary purposes,” and this allegation was admitted to be true. In the present case no such allegation is made. The statute (section 3373) is silent as to the manner in which such decision should be made manifest, and upon the pleadings as they appear in this record the question argued does not arise.

6. The statutes involved in this action were considered at [6] length in *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203, and it was there held that it is a question for the legislature to determine in the first instance what property will be specially benefited by an improvement; and in *Beck v. Holland*, 29 Mont. 234, 74 Pac. 410, it was determined that the legislative authority can be, and in these statutes was, delegated to the city council.

The council, then, having observed the method of procedure ordained by the statute, acquired jurisdiction to order the improvement and to levy the assessment against plaintiffs' property, and the assessment thus levied became a lien upon the property from the date when such assessment became due (section 3407), and was not affected by the fact that thereafter each of these plaintiffs recovered a judgment against the city for damages on account of the street grading done pursuant to Ordinance 849A.

The judgment is affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

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BOYLE ET AL., APPELLANTS, v. CITY OF BUTTE, RESPONDENT.

(No. 3,929.)

(Submitted September 13, 1918. Decided October 7, 1918.)

[175 Pac. 596.]

For syllabus, see Cause No. 3,928.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Mary E. Boyle and others against the City of Butte. From a judgment for defendant, plaintiffs appeal. Affirmed.

Same counsel as in *Allen v. City of Butte*, ante, p. 205.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The facts of this case are in all substantial particulars identical with the facts in *Allen v. City of Butte*, ante, p. 205, 175 Pac. 595. Upon the authority of that case, the judgment herein is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER concur.

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SILVER, RESPONDENT, v. EAKINS, EXECUTRIX, APPELLANT.

(No. 3,932.)

(Submitted September 16, 1918. Decided October 14, 1918.)

[175 Pac. 876.]

*Partnership—Assets—Recovery—Complaint—Death of Partner—Effect—Evidence—Copies—Actions—Dismissal—Discretion.*

Partnership—Recovery of Partnership Assets—Complaint.

1. Complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner, held insufficient, under section 7607, Revised Codes, for failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession.

Same—Action Against Partner—Rule.

2. The rule that one partner cannot maintain an action at law against his copartner until an accounting is had and a balance determined ceases upon the death of one of them.

Same—Death of Partner—Rights of Surviving Partner.

3. Upon the death of one partner, the partnership is dissolved, and the surviving partner is at once entitled to the possession of sufficient firm property to discharge its debts, and, if necessary for that purpose, to maintain an action for money had and received to recover firm assets from the estate of the deceased partner.

Actions—Dismissal—Want of Prosecution—Discretion.

4. Whether an action should be dismissed for want of prosecution is a question addressed to the discretion of the trial court.

**Partnership—Death of Partner—Rights of Surviving Partner.**

5. The failure of a surviving partner to give the bond required by section 7607, Revised Codes, did not affect his right to the possession of the firm property, or defeat his right to maintain any appropriate action concerning it.

[As to the effect of the death of one member of the firm, see notes in 77 Am. Dec. 114; 86 Am. Dec. 600.]

**Same—Elements of—Evidence—Sufficiency.**

6. To establish the existence of a partnership it is not necessary that its elements should be made to appear by direct evidence; if the jury could, from the evidence before them, draw the legitimate inferences required to complete proof of its existence, it was sufficient.

**Evidence—Copies of Entries in Bank Books.**

7. Copies of accounts taken from a bank ledger, being secondary evidence, were inadmissible under section 7872, Revised Codes, but the witness called to testify concerning them could properly show the general results shown by the ledger, & *e.*, the balance deducible from computation.

**Same—Use of Memorandum—Preliminary Proof.**

8. The use of a memorandum by a witness in testifying is, under section 8020, Revised Codes, permissible only after the necessary preliminary proof qualifying the witness has been made.

*Appeal from District Court, Silver Bow County in the Second Judicial District; R. Lee Word, a Judge of the First District, presiding.*

**ACTION** by J. R. Silver against Mary A. Eakins, as executrix of the last will and testament of John Eakins, deceased. From a judgment for plaintiff and an order denying new trial, defendant appeals. Reversed and remanded.

*Mr. W. A. Pennington*, for Appellant, submitted a brief, and argued the cause orally.

The authorities cited below covering tortious acts of the executor or administrator, including negligence, trespass, taking, withholding and converting money, property or effects, or applying property of others to the uses of the estate, as well as contracts, express and implied, written or oral, made by the executor or administrator, all hold that an action against the executor or administrator, as such, does not lie, and that all such claims for acts of the representative, occurring after the death of the testator or intestate, can only be prosecuted against the executor or administrator, personally, who may in

turn have the claim allowed to him in the settlement of his accounts with the estate, if the transaction resulted to the advantage of the estate. (*Dodson v. Nevitt*, 5 Mont. 518, 6 Pac. 358; *First Nat. Bank v. Collins*, 17 Mont. 433, 52 Am. St. Rep. 695, 43 Pac. 499; *Sterrett v. Barker*, 119 Cal. 492, 51 Pac. 695; *Nickals v. Stanley*, 146 Cal. 724, 81 Pac. 117; *State ex rel. Kelly v. Second Judicial District Court*, 25 Mont. 33, 63 Pac. 717; *Garver v. Thoman*, 15 Ariz. 38, 135 Pac. 724; *Hickman-Coleman Co. v. Leggett*, 10 Cal. App. 29, 100 Pac. 1072; *Van Slooten v. Dodge*, 145 N. Y. 327, 39 N. E. 950; 2 Woerner's American Law of Administration, 2d ed., sec. 356; Schouler on Executors and Administrators, 3d ed., sec. 256.)

The complaint alleges that the fund in question was firm property, and that the defendant, as executrix, disputes his claim and refuses to give it to him. This dispute, if an action lies against the executrix at all, must be determined in exactly the same manner as if it had arisen between Silver and Eakins, in the lifetime of Eakins, which would be a suit in equity. (*Baehme v. Fitzgerald*, 43 Mont. 226, 115 Pac. 413; *Riddell v. Ramsey*, 31 Mont. 386, 78 Pac. 597; *Gleason v. White*, 34 Cal. 258; *Arnold v. Arnold*, 90 N. Y. 580; *Gillett v. Chaves*, 12 N. M. 353, 78 Pac. 68, 71; *Blakely v. Smock*, 96 Wis. 611, 71 N. W. 1052; *Bruns v. Heise*, 101 Md. 163, 60 Atl. 604; *Miller v. Andres*, 13 Ga. 366; Story on Equity, 13th ed., secs. 659, 660, 672, 674, 677.)

*Mr. Francis A. Silver*, for Respondent, submitted a brief.

While the death of Eakins worked a dissolution of the partnership, it did not affect the firm estate except to give to respondent, as the sole surviving partner, exclusive control of the property. (*Bischoffsheim v. Baltzer*, 20 Fed. 890; *Müller v. Jones*, 39 Ill. 54; *Andrews' Heirs v. Brown's Admr.*, 21 Ala. 437, 56 Am. Dec. 252; *Territory v. Redding*, 1 Fla. 242; *Appeal of Shipe*, 114 Pa. St. 205, 6 Atl. 103; *Robertshaw v. Hanway*, 52 Miss. 713; *Blodgett v. Muskegon*, 60 Mich. 580, 27 N. W.

686; *Valentine v. Wysor*, 123 Ind. 47, 7 L. R. A. 788, 23 N. E. 1076; *Huggins v. Huggins*, 117 Ga. 151, 43 S. E. 759.)

Until the surviving partner has performed his functions, he is entitled to the quiet and exclusive possession of all the firm assets. Neither heirs nor personal representatives have a right to possession of the partnership property until the partnership affairs are liquidated by the surviving partner and has delivered a balance to them. And if the heirs or personal representatives interfere with his possession of the firm assets, he can sue them at law. (*Hawkins v. Capron*, 17 R. I. 679, 24 Atl. 466; *Calvert v. Marlow*, 18 Ala. 67; *Hewitt v. Hayes*, 204 Mass. 586, 27 L. R. A. (n. s.) 154, 90 N. E. 985; *Sweet v. Taylor*, 36 Hun (N. Y.), 256; *Shields v. Fuller*, 4 Wis. 102, 65 Am. Dec. 293; *Kinsler v. McCants*, 4 Rich. (S. C.) 46, 53 Am. Dec. 711; *Thomasson v. Lucas*, 4 Ky. Law Rep. 889; *Compton v. Whitehouse*, 48 N. Y. Super. Ct. 208; *Clapp v. Walters*, 2 Tex. 130; 30 Cyc. 648.)

If an administrator or executor by virtue of his representative character receives property not belonging to the estate, he is liable in the same character to the person entitled. (*De Valengin v. Duffy*, 39 U. S. 282, 289, 10 L. Ed. 457, 460; *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462; *Moran v. Morrill*, 78 App. Div. 440, 80 N. Y. Supp. 120; *Pabst Brewing Co. v. Small*, 83 Minn. 445, 86 N. W. 450; *Hill v. Escort*, 38 Tex. Civ. App. 487, 86 S. W. 367; *Collins v. Denny Clay Co.*, 41 Wash. 136, 82 Pac. 1012; *Murray v. Mumford*, 6 Cow. (N. Y.) 441; *Calvert v. Marlow*, 18 Ala. 67; *Hawkins v. Capron*, 17 R. I. 679, 24 Atl. 466.)

Secondary evidence of the books of the bank was admissible. The books of a bank are private books of public importance, and ought to be governed by the same rules that relate to the production of public records and documents in evidence. If the books of a bank are to be held liable to production in evidence at any time, because of the general and constant use and importance of these records, there is certain to result an inconvenience, not merely individual, but general in nature. (2 Wig-

more on Evidence, sec. 1223; *People v. Hurst*, 41 Mich. 328, 1 N. W. 1027; *Crawford v. Branch Bank*, 8 Ala. 79.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

M. J. McCune secured a contract to erect a warehouse for the Butte Wholesale Grocery Company, and also a contract for some work for the Colusa-Parrot Company. In each instance he gave a bond for the faithful performance of his contract, with plaintiff and John Eakins as sureties. Before either contract was fully executed, McCune notified Eakins & Silver that he was unable to complete the work, and directed them to take over the contracts, complete the work, collect the balance due, and pay the bills. Within two or three days thereafter McCune died. Eakins & Silver agreed between themselves to do as directed and to meet the pay-roll for the then current week. They borrowed \$200 from the First National Bank, had the amount placed to the credit of "Eakins & Silver," and at the end of the week the laborers were paid by checks drawn by Eakins against this account and signed "Eakins & Silver." A dispute arose as to the amount due under the warehouse contract, and Eakins & Silver employed an architect to measure up the work and estimate the balance due. When this was done, the parties agreed that there was due under the contract proper the sum of \$1,920.80, and for extras the further sum of \$424.20, and two checks—one for each of these amounts—were drawn in favor of and delivered to John Eakins. Eakins became sick, and during his illness expressed his intention to indorse the checks and deliver them to Silver, but before this was done he died. The checks were found among his effects, were cashed, the money placed to the credit of his individual account, and later, when defendant qualified as executrix of his will, the money was treated as a part of the assets of his estate, and possession of it taken and retained by defendant as his personal representative. Silver, acting as sole surviving



partner of the firm of Eakins & Silver, presented a claim against the estate of John Eakins for the \$1,920.80, but the claim was disallowed and this action was instituted to recover the amount.

Briefly, the complaint charges that Eakins & Silver were copartners engaged in completing the work under the McCune contracts, that Silver is sole surviving partner, that the \$1,920.80 was and is partnership money, that it was received by Eakins and retained as a part of the assets of his estate, that plaintiff presented a claim for the amount, and that the claim was rejected. The answer admits the death of Eakins, the qualification of defendant as executrix, the rejection of plaintiff's claim, and denies all the other material allegations of the complaint. By way of affirmative defense it was alleged that Silver had failed to give the surviving partner bond required by section 7607, Revised Codes. On motion of plaintiff this defense was stricken from the answer. The trial resulted in a judgment for plaintiff, and from that judgment, and from an order denying a new trial, defendant appealed.

1. Does the complaint state a cause of action? Section 7607 defines the rights, duties and liabilities of a surviving partner. [1] It authorizes him to continue in possession of the partnership, to settle its affairs, and to account and pay over to the personal representative of the deceased partner any balance due in right of the decedent. Apparently the complaint was drawn upon the theory that the surviving partner is entitled as of right to the possession of all the firm assets until the partnership affairs are finally settled. If the partnership assets in the possession of Silver, as surviving partner, were sufficient to pay the partnership debts, then any balance due him in right of his partnership interest could be recovered only on a settlement of the firm account. (*Franklin v. Tonjours*, 1 White & W. Civ. Cas. (Tex.), sec. 506.) If the partnership assets in his possession exceeded the debts and Silver's interest, then manifestly it would be an idle ceremony to require the estate

to deliver this \$1,920.80 to the surviving partner, only to require him to redeliver it to the estate upon final settlement. These observations suffice to disclose the reasonableness of the rule which requires the surviving partner to make known the amount of partnership debts and the amount of firm assets in his possession, to the end that the court may determine whether possession of firm property held by the estate of the deceased partner is necessary, in order that the surviving partner may discharge the duties imposed upon him by statute. The complaint does not disclose the amount of firm debts, if any, nor the amount or value of firm assets in the possession of the surviving partner, and for this reason it does not state a cause of action. (*Painter v. Painter's Estate*, 68 Cal. 395, 9 Pac. 450.)

We do not agree with appellant, however, that if the complaint contained these essential allegations it would still not state a cause of action. It is true that one partner cannot [2] maintain an action at law against his copartner, at least until an accounting is had and a balance determined, and the reason for this rule is apparent. The interest of each partner extends to every portion of the firm property (sec. 5469, Rev. Codes), and therefore neither partner is entitled, as against the other, to the exclusive possession of the whole or any specific part of the partnership assets. (*Boehme v. Fitzgerald*, 43 Mont. 226, 115 Pac. 413.) But whenever the reason for that rule ceases, so does the rule itself, and the reason ceases immediately upon the death of one partner. The partnership is [3] thereupon dissolved (section 5494), and the surviving partner becomes at once entitled to the possession of sufficient firm property to enable him to discharge the duties imposed by section 7607. (*Bank v. Silver*, 45 Mont. 231, 122 Pac. 584.) If, then, it was made to appear by this complaint that possession of this \$1,920.80 was necessary to settle the firm debts, an action for money had and received would lie to recover it. (*Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462; 20 R. C. L., p. 1010.)

2. Whether this action should have been dismissed for want [4] of prosecution was a question addressed to the sound legal discretion of the trial court, and in the absence of a showing of abuse of such discretion we are not disposed to interfere. (*Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692.)

3. The failure of plaintiff to give the bond required by section 7607 did not affect his right to the possession of the firm property, or defeat his right to maintain any appropriate action concerning it. The bond is required merely to protect the interest of the deceased partner. (*Blaker v. Sands*, 29 Kan. 551; *Holman v. Nance*, 84 Mo. 674; *McCaughan v. Brown*, 76 Miss. 496, 25 South. 155.)

4. We think the evidence is sufficient to show that a partnership [6] existed between Eakins & Silver. It is true that all the necessary elements do not appear from the direct evidence, and it is not necessary that they should; but we do think that from the direct evidence the jury might draw the legitimate inferences necessary to complete the proof. (*Croft v. Bain*, 49 Mont. 484, 143 Pac. 960.)

As between the parties, there was an assignment by McCune to Eakins & Silver of the two contracts and the balance due under them. In other words, Eakins & Silver stepped in the shoes of McCune, and agreed to complete the work, pay the workmen, and receive the balance due under the contracts. In the absence of any showing that there was not a possibility of profit to them, the inference is legitimate that they intended their agreement to comprehend the sharing of profits and losses; and in this connection we observe, in passing, that the evidence warranted the court in defining the term "partnership" in the language of section 5466, Revised Codes.

5. In several of the instructions the court ignored the principle to which we have adverted, *viz.*, that possession of the \$1,920.80 by Silver was necessary to the discharge of his duties as surviving partner, and, though this objection was not interposed, attention is directed to the defect, that it may not appear upon another trial.

6. J. S. Dutton, cashier of the First National Bank, was [7] called to testify concerning the account of Eakins & Silver and the individual account of John Eakins. He produced a copy of each account taken from the bank's ledger, and testified from it, over the objections of defendant. Assuming that the ledger was a book of original entry, within the meaning of section 7951, Revised Codes, and that the requisite preliminary proof had been made, as indicated by this court in *Ryan v. Dunphy*, 4 Mont. 356, 47 Am. Rep. 355, 5 Pac. 324, and *Meredith v. Roman*, 49 Mont. 204, 141 Pac. 643, the ledger itself would have been the best evidence of its contents, and secondary evidence was not admissible, since the case does not fall within any one of the first four subdivisions of section 7872, Revised Codes. In so far as it was sought to show the general results merely—for instance, the balance deducible from computation—the witness was properly permitted to state what was shown by the ledger (subd. 5, sec. 7872), but the copies themselves were not admissible.

It may be that in some jurisdictions the best evidence rule has been modified to admit copies of bank books, and that the inconvenience to the bank and its patrons, arising from the absence of the books in court when needed in the conduct of the bank's business, has been deemed sufficient justification for the change; but in this state the Codes have established the rule otherwise, and we are not at liberty to disregard it.

If it was the purpose of plaintiff to invoke the rule of section [8] 8020, which permits a witness to use a memorandum, it is sufficient to say he did not make the necessary preliminary proof. (*Marron v. Great Northern Ry. Co.*, 46 Mont. 593, 129 Pac. 1055.)

7. We think the special interrogatories submitted by defendant were not appropriate under the circumstances, and for this reason were properly refused. Each of them ignored the principle for which plaintiff contends, *viz.*, that McCune had previously assigned the \$1,920.80 to the firm of Eakins & Silver.

The other assignments do not call for special consideration. For the reasons given, the judgment and order are reversed and the cause is remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

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BAUM, RESPONDENT, v. NORTHERN PACIFIC RY. CO.,  
DEPENDANT; SATHRE, INTERVENER, APPELLANT.

(No. 3,933.)

(Submitted September 16, 1918. Decided October 22, 1918.)

[175 Pac. 872.]

*Real Property—Conveyances—Record—Constructive Notice—  
Possession—Tender.*

Real Property—Instruments—Record—When not Notice.

1. A bill of sale conveying an interest in land which was not acknowledged or proved was not entitled to record under section 4646, Revised Codes, and therefore its record imparted no constructive notice to anyone.

Same—Possession—Notice.

2. Where the deed under which one holds land is of record and the grantee takes possession, such possession is referable to such deed, and a subsequent purchaser is relieved from further inquiry to ascertain whether any other or different claim is asserted.

Same.

3. Possession of land does not alone impart actual notice of any claim or right in the party in possession, but is, at most, constructive notice such as arises from the record of a deed, and cannot impart notice of any greater claim than the occupant has.

[As to effect of possession of real property as notice, see note in 104 Am. St. Rep. 331.]

Tender—When Unnecessary.

4. A tender is not necessary when it appears that it would have been refused, if made.

*Appeal from District Court, Silver Bow County; J. J. Lynch,  
Judge.*

ACTION by A. C. Baum against the Northern Pacific Railway Company, a corporation, in which Sophia Sathre intervened. From a judgment for plaintiff and from an order denying a new trial, intervener appeals. Remanded, with directions.

*Mr. John T. Andrew* and *Mr. Edwin M. Lamb*, for Appellant, submitted a brief.

*Mr. W. D. Kyle*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY, delivered the opinion of the court.

By an instrument in writing dated August 21, 1901, the Northern Pacific Railway Company contracted to sell to Rees and Brigman the north half and southwest quarter of section 3, township 2 north, range 8 west, in Silver Bow county, for the sum of \$1,093.54, payable \$108 in cash and the balance in ten installments with interest; the purchasers to pay all taxes assessed against the land from the date of the agreement. On August 22, Rees, in consideration of \$850 cash, executed and delivered to Sophia Sathre a bill of sale for certain personal property and all his right, title and interest in and to "the northwest quarter of section 10, township 2, range 8 west." On the same day, Brigman, in consideration of \$850 cash, executed and delivered to Mrs. Sathre a deed by which he conveyed an undivided half interest in and to the west half of section 3, township 2 north, range 8 west, subject to the provisions of the Northern Pacific contract. Mrs. Sathre also agreed to pay, and did pay, the \$108 installment on the contract. On October 21, Rees, by an indorsement on the Northern Pacific contract, assigned all his interest in that contract to Brigman. On November 13, the bill of sale from Rees to Mrs. Sathre was filed with the county clerk and recorder. On November 14 Brigman, in consideration of \$2,300, delivered to

Mrs. A. C. Baum the Northern Pacific contract, and at the same time executed and delivered to her a deed by which he assumed to convey to her all his right, title and interest in and to the northeast quarter and an undivided half interest in the west half of section 3, township 2 north, range 8 west. Mrs. Baum also assumed and agreed to pay the remaining installments due under the contract. On November 20, the deed from Brigman to Mrs. Sathre was filed for record. Mrs. Baum paid the deferred installments on the contract as they became due, paid all taxes assessed against the land, and then demanded a deed. The railway company refused because of some claim made by Mrs. Sathre, and Mrs. Baum, as assignee of Rees and Brigman, instituted this suit to enforce specific performance of the contract. Mrs. Sathre intervened and set forth her claim to the southwest quarter of section 3, by virtue of her transactions with Rees and Brigman. The railway company assumed the attitude of an indifferent stakeholder, ready to make conveyance to whomever was found to be entitled thereto. The trial of the cause resulted in a judgment in favor of plaintiff, and the intervener has appealed from that judgment and from an order denying a new trial.

There is not any substantial conflict in the evidence, and the only question presented is: What are the relative rights of plaintiff and intervener as disclosed by the record?

It may be assumed as established that Mrs. Baum intended to purchase all the interests of Rees and Brigman—intended to take an assignment of the Northern Pacific contract in its entirety—and that by fraud or mistake the written evidence of the assignment erroneously described the interest conveyed. Likewise, it may be assumed that Mrs. Sathre intended to purchase all the interests of Rees and Brigman in the southwest quarter of section 3; that is, to take an assignment of the Northern Pacific contract in so far as it related to the particular quarter-section, and as a part of the consideration, to pay to the railway company the proportional part of the subsequent installments chargeable to that tract, and that by mis-

take or inadvertence the interest was described erroneously. [1] The bill of sale from Rees was not acknowledged or proved, as required by section 4646, Revised Codes, and was not entitled to be recorded.

The deed from Brigman to Mrs. Sathre was not filed for record until after Mrs. Baum purchased, but the evidence is undisputed that Mrs. Sathre was in actual possession of at least a portion of the southwest quarter of section 3 at the time Mrs. Baum acquired her interest, and that Mrs. Baum had actual knowledge that some one other than her grantor was occupying the buildings on this quarter-section, at the time she purchased, and that she made no inquiry to ascertain by what right such possession or occupancy was held. If the conveyance from Rees to Mrs. Sathre had been admissible to record and had been recorded, it would not have given any notice, since it described land in another section. If the deed from Brigman to Mrs. Sathre had been recorded, Mrs. Baum would have been charged with notice of its contents (sec. 4683, Rev. Codes); that is to say, she would have been charged with knowledge that an undivided one-half interest in the west half of section 3 had been transferred to Mrs. Sathre; and since the [2] Brigman deed is such a conveyance that under it Mrs. Sathre would have been entitled to possession, though it conveyed but an undivided half interest (38 Cyc. 17), Mrs. Baum might then have referred the possession to this deed and would have been relieved from further inquiry to ascertain whether any other or different claim was asserted. (*Hurley v. O'Neill*, 26 Mont. 269, 67 Pac. 626.)

What, then, was the effect upon Mrs. Baum's purchase of the possession held by Mrs. Sathre, under the conveyance from [1] Rees and Brigman? Since the bill of sale was not entitled to be recorded, the record of it imparted no constructive notice whatever (39 Cyc. 1733; note, Ann. Cas. 1913B, p. 1070); but the conveyance itself was valid as between Rees and Mrs. Sathre (section 4687, Rev. Codes). So, likewise, the unrecorded Brigman deed was valid as between the parties to it.



(*Id.*) In *Mullins v. Butte Hardware Co.*, 25 Mont. 525, 87 Am. St. Rep. 430, 65 Pac. 1004, this court adopted the theory of the law approved by Pomeroy, as follows: "The law is well settled that the actual, visible, notorious, continuous, exclusive and unequivocal possession of 'a definite tract of land by one rightfully in possession or holding under a valid title is a constructive notice to subsequent purchasers and encumbrancers of whatever estate or interest in the land is held by the occupant, equivalent in its extent and effects to the notice given by the recording or registration of his title.' (2 Pomeroy's Equity Jurisprudence, 3d ed., sec. 615.)"

Possession alone does not impart actual notice of any claim or right in the party in possession. At most, it is but constructive notice such as arises from the record of a deed, and from the very nature of the case it cannot impart notice of any greater claim than the occupant has. Mrs. Sathre's possession was *prima facie* evidence of some claim or right, sufficient of itself to put Mrs. Baum upon inquiry; and, since she made no inquiry, the title which she subsequently acquired must be held to be subordinate to any claim which Mrs. Sathre has shown that she could establish. (*Phelan v. Brady*, 119 N. Y. 587, 8 L. R. A. 211, 23 N. E. 1109.)

Though Mrs. Sathre relies exclusively upon the conveyances from Rees and Brigman as the sources of her title, and though she insists that by mistake or inadvertence each of those instruments incorrectly describes the interest which she intended to purchase, she fails altogether to disclose that the mistake was mutual or made under such circumstances that a court of equity could decree correction. (Sec. 6108, Rev. Codes.) The evidence discloses that Mrs. Sathre discovered the alleged mistake in each conveyance to her soon after it occurred, but made no effort to have it corrected prior to the time this action was commenced, or until long after the bar of the statute of limitations was available as a defense. (Sec. 6449, Rev. Codes.) So far as this record goes, the bill of sale and deed describe the only interest which she could ever establish. She disclaims

any interest in the northwest quarter, and her title to the southwest quarter is limited to an undivided one-half interest therein.

The failure of Mrs. Sathre to make tender of the amount due for her proportional part of the purchase price, interest and [4] taxes is excused by the conduct of Mrs. Baum. A tender is not necessary when it appears that it would have been refused, if made. (*Armstrong v. Poe*, 35 Mont. 557, 90 Pac. 758.)

The equities of the case require that the intervener pay to plaintiff the just proportion of the purchase price and taxes with interest, and that she account for rents, issues and profits received from her possession; that these be adjusted; and that the decree be then modified to direct a deed from the railway company to Mrs. Baum for the north half and an undivided one-half interest in the southwest quarter of section 3, and a deed to Mrs. Sathre for an undivided one-half interest in the southwest quarter of the same section.

A new trial is unnecessary, and the motion denying it is affirmed.

The cause is remanded to the district court, with directions to take such supplementary proof as is necessary, and to modify the decree in accordance with the views herein expressed.

*Remanded with directions.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE SANNER  
concur.

## JONES, RESPONDENT, v. SHANNON ET AL., APPELLANTS.

(No. 3,931.)

(Submitted September 14, 1918. Decided October 24, 1918.)

[175 Pac. 882.]

*Innkeepers—Rights of Guests—Ejection—Compensatory and Exemplary Damages—Malice—Principal and Agent—Judgments—Evidence—Res Gestae—Excessive Verdicts.***Innkeepers—Rights of Guest—Use of Room.**

1. A guest at a public house is entitled to the exclusive use of the room to which he is assigned, subject to the right of the proprietor as well as his servants and agents, to have access to it when necessary to the proper and reasonable discharge of their duties at such times and in such manner as consistent with the rights of the guest.

**Same—Rights of Proprietor—Ejection of Guest.**

2. In the exercise of his duty to see that a guest does not so conduct himself as to be a source of annoyance and discomfort to other guests, the proprietor of a public house may, if he finds it necessary to perform his duty in that regard, enter the room occupied by such guest and eject him therefrom and from the house, provided he uses no more force than is necessary.

**Same—Ejection of Guest—Compensatory and Exemplary Damages.**

3. A hotel proprietor who wrongfully forces an entry into the room of a guest and without just cause ejects him from it and the house is liable not only for compensatory but also exemplary damages, if the ejection is accompanied by circumstances indicating that it was prompted by malice, fraud or a spirit of oppression.

**Same—Ejection of Guest—Compensatory Damages—Evidence—Sufficiency.**

4. Evidence held sufficient to justify a verdict for compensatory damages against defendant innkeeper for wrongfully ejecting plaintiff from her room in the early hours of the morning, under a charge that she was conducting herself in a disorderly manner.

[Who are innkeepers and who are their guests, and for what the former are liable to the latter, see note in 7 *Am. Dec.* 449; and see note in 105 *Am. St. Rep.* 932.]

**New Trial—Review—Discretion.**

5. In no case will the conclusion of the district court in disposing of a motion for a new trial be revised on appeal, except for manifest abuse of its discretion.

**Same—Disposition of Motion by New Judge—Effect.**

6. Where a motion for a new trial is disposed of by a judge other than the one who presided at the trial, the question on appeal is not whether the judge was guilty of abuse of his discretion in denying it, but whether the evidence as presented in the printed record preponderates decisively against the verdict.

On liability of innkeeper for ejection of guest, see note in 42 *L. B. A.* (n. s.) 830.

**Principal and Agent—Torts—Liability.**

7. A principal is liable in damages for wrongs done by his agent while in the discharge of the duties intrusted to him by the principal, even though the latter is ignorant of the wrongs.

**Innkeepers—Ejection of Guest—Malice—Exemplary Damages.**

8. Where a guest at a hotel was wrongfully ejected from her room at night without just reason or excuse by the owner's wife, who further exacted payment of an unlawful demand before permitting the guest to leave the house, the jury were justified in the conclusion that the ejection was prompted by malice warranting a finding for exemplary damages.

**Same—Ejection of Guest—Malice of Agent—Liability of Principal.**

9. *Held*, under the rule that a principal is not accountable for the malignant motives of his agent unless he authorized the act for which recovery is sought, participated in its commission or subsequently ratified it, that a hotel-keeper who was not present, took no part in nor subsequently ratified his wife's wrongful act in ejecting a guest from the house, was not liable in exemplary damages, since the malice of his wife was not imputable to him.

**Same—Malice of Agent—Ratification by Principal.**

10. Unless the principal has knowledge of the circumstances attending a malicious act of his agent, there can be no such ratification of the act as will subject the principal to the imputation of malice.

**Judgments—Codefendants—Separate Judgment Against One.**

11. In a tort action against several defendants, judgment may be rendered allowing recovery against all jointly for compensatory damages, and for exemplary damages against one only.

**Evidence—Res Gestae.**

12. In an action for wrongful ejection from a hotel, evidence of what occurred in the lobby after plaintiff and her husband started to leave the place was admissible as part of the *res gestae*.

**Innkeepers—Ejection of Guest—Excessive Verdict.**

13. *Held*, that a verdict of \$500 against a hotel-keeper and his wife jointly as compensatory damages for wrongfully ejecting plaintiff from her room and the house at night, and \$250 against the wife as exemplary damages, was not excessive.

*Appeal from District Court, Valley County; Frank N. Utter, Judge.*

ACTION by Ruth Jones against W. F. Shannon and wife. Judgment for plaintiff. Defendants appeal from an order denying them a new trial. Affirmed as to Lila Shannon and remanded as to W. F. Shannon on condition.

*Messrs. Slattey & Kline and Messrs. Freeman & Thelen, for Appellants, submitted a brief; Mr. Jas. M. Freeman argued the cause orally.*

*Messrs. Norris, Hurd & McKellar*, for Respondent, submitted a brief; *Mr. E. L. Norris* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendants, W. F. and Lila Shannon, are husband and wife. The husband owns and conducts a public inn or hotel at Glasgow, in Valley county, known as the Shannon Hotel, the wife giving her assistance by acting as housekeeper and exercising a general supervision over the guests and their entertainment, her husband giving her authority to do so. On the evening of November 10, 1913, the plaintiff was a guest of the hotel, intending to spend the night there. She and her husband, Roy Jones, were assigned to a room and were occupying and using it. After narrating the foregoing facts, the complaint charges:

"IV. That said plaintiff, while so occupying the room so assigned her by the said defendants, at about the hour of 1 o'clock in the night of November 10, 1913, retired, and thereafter the said defendant Lila Shannon willfully, wrongfully, forcibly and maliciously entered the said room, so assigned as aforesaid, of this plaintiff, and then and there abused and insulted this plaintiff, applying to her vile and indecent epithets, and charged the said plaintiff with improper and disorderly conduct, and wrongfully, maliciously and without any cause therefor required, demanded and compelled said plaintiff to arise from the bed in said room to which she had retired, and dress, and wrongfully, forcibly, maliciously and without any cause therefor ousted and ejected said plaintiff from said hotel."

It then alleges that by being ejected from the hotel and thus compelled to find lodging elsewhere late at night, the plaintiff suffered great inconvenience and humiliation, and great mental anguish and bodily pain, to her damage in the sum of \$5,000.

The answer, by direct and argumentative denials, puts in issue every allegation of the complaint, except that the defend-

ant W. F. Shannon was the owner and proprietor of the Shannon Hotel, and that plaintiff was a guest there at the time alleged.

The trial resulted in a verdict against the defendants jointly for \$500 compensatory, and against each of them for \$250 exemplary, damages, and judgment was entered accordingly. The defendants have appealed from an order denying them a new trial.

It is contended by counsel that the court erred in denying the motion for a new trial, because the evidence is insufficient to justify a verdict for either compensatory or exemplary damages.

When a person has been received as a guest at a public house, [1] he is entitled to the exclusive use of the room to which he is assigned, subject to the right of the proprietor, as well as his servants and agents, to have access to it when necessary to the proper and reasonable discharge of their duties. These entries must be at such times and in such manner as are consistent with the rights of the guest. (*De Wolf v. Ford*, 193 N. Y. 397, 127 Am. St. Rep. 969, 21 L. R. A. (n. s.) 860, 86 N. E. 527; *Lehnen v. Hines*, 88 Kan. 58, 42 L. R. A. (n. s.) 830, 127 Pac. 612; 14 R. C. L. 505.) As it is the duty of the [2] proprietor to give reasonable attention to the comfort of his guests, so it is his right as well as his duty to see that a particular guest does not so conduct himself as to be a source of annoyance and discomfort to the other guests. This implies the duty to require the guest to refrain from annoying or offensive conduct, and, if it becomes necessary to perform this duty, the proprietor may enter the room occupied by such a guest and eject him therefrom and from the house, provided, however, he uses no more force than is necessary. (*Lehnen v. Hines*, *supra*; *McHugh v. Schlosser*, 159 Pa. 480, 39 Am. St. Rep. 699, 23 L. R. A. 574, 28 Atl. 291; *Holden v. Carraher*, 195 Mass. 392, 11 Ann. Cas. 724, 81 N. E. 261.) If, therefore, the proprietor himself, or by his servant or agent, trespasses upon [3] the rights of the guest, by forcing an entry into his room

and ejecting him therefrom and from the house without just cause, he is liable to the guest for compensatory damages. The recovery may also include exemplary damages, if the ejection is accompanied by circumstances indicating that it was prompted by malice, fraud or a spirit of oppression. (*McCarthy v. Niskern*, 22 Minn. 90; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586; Rev. Codes, sec. 6047.)

As to compensatory damages: At about 6 o'clock on the [4] evening in question, plaintiff, in company with her husband and two lady friends, Mrs. Gaasch and Mrs. Hankins, reached Glasgow by train and went to the Shannon Hotel to spend the night. Plaintiff and her husband were assigned to room 22 on the third floor. The two friends were assigned to room 23, immediately adjoining room 22. Access to room 23 could be had only through room 22 by a connecting doorway; the two rooms being apparently constructed for use as a suite. After having supper, plaintiff with her two friends left their rooms, and were not in them again until about midnight, when they returned and retired to bed. The door between the rooms was then closed. Roy Jones, the husband of plaintiff, had not up to this time been to the room, and did not then accompany plaintiff, but remained about the lobby until half an hour later, when he also retired. While he was engaged in getting undressed for bed, in response to a rap on the door leading from the hall, he opened it wide enough to ascertain what was wanted. He found the defendant Lila Shannon there, who inquired, "Who's making all this noise in here?" He answered that no one was making noise that he knew of. What thereafter occurred is related in detail by this witness, the plaintiff, Mrs. Gaasch, and Mrs. Hankins. Their several statements tend to establish these facts: That with a show of anger, accompanied by threats of violence, Mrs. Shannon forced her way, not only into room 22, but also into room 23; that she charged the occupants of both with disturbing herself and guests by loud talk and laughter, and by stamping on the floor; that this was done in a loud and boisterous manner; that when

this was denied by Mr. Jones, with the request that she leave the room, she threatened to throw him out of the window; that she persisted in the charge, telling them that they must either behave or leave the house, and that finally, when Mr. Jones said to her that if they had to leave the house they would do so, she ordered them to get out and then left; that Mr. Jones then told the plaintiff, who was lying in bed, to get up and dress, and to tell Mrs. Gaasch and Mrs. Hankins, which she did; that they all dressed and proceeded down to the lobby on their way out; that Mrs. Shannon, who had preceded them to the lobby, demanded payment for their rooms for the night, besides the price of supper for the four the previous evening, and also for breakfast next morning; that Mr. Jones thereupon paid the price of the supper for the four, but declined to pay more; that she prevented them from reaching the door leading into the street, by standing in their way and threatening to knock Mr. Jones' head off, and pushing the plaintiff from the door; that she took the hand baggage of all the party and held it until the entire bill was paid, calling in a policeman to assist her in compelling payment; that upon its payment by Mr. Jones they all left the hotel, and after searching for some other hotel or lodging-house where they could find lodging for the rest of the night, and not being able to find one, they went to the house of a friend, where they spent the rest of the night. The testimony of these witnesses tends to show, further, that when they finally secured lodging plaintiff had become ill from nervous shock, and continued in that condition for a week afterward. Before they finally left the hotel, Mr. Jones inquired for the defendant W. F. Shannon, in order to adjust the controversy with him, but was told by Mrs. Shannon that he was in bed and that she was the landlady. There is no controversy that she had general charge and supervision of the rooms and guests. Her account was in direct conflict with the foregoing in every material particular. She stated that she and her husband, who, she said, were asleep in their room immediately below rooms 22 and 23, were aroused by a noise



of loud talk and laughter and stamping on the floor above; that she went up to ascertain the cause of it; that upon going into the rooms, to which she was admitted after rapping at plaintiff's door, she requested the occupants to refrain from creating further disturbance, calling their attention to the fact that there were other guests in the house who should not be disturbed. She denied that she threatened any violence to any one, either in the plaintiff's room or in the lobby. She stated, further, that both while in plaintiff's room and after the party had reached the lobby she insisted that they should continue to occupy their rooms for the rest of the night, refraining in the meantime from making noise as they had done, but that they refused to do so. She admitted that she exacted payment of the amount paid by Mr. Jones before she consented that the party might leave the hotel.

This brief synopsis of the evidence is sufficient to show that it presented a substantial conflict, the solution of which was primarily the province of the jury. As we have so often said, the conclusion of the jury in such a case must be accepted as final and conclusive, subject to the rule, however, that it is within the sound legal discretion of the trial judge to grant a new trial on motion of the losing party, if, aided by his recollection of the appearance and conduct of the witnesses in giving their testimony at the trial, he is impelled to the conclusion that the evidence as a whole preponderates against the verdict. (*Orr v. Haskell*, 2 Mont. 225; *Western Min. Supply Co. v. Melzner*, 48 Mont. 174, 136 Pac. 44; *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.) Otherwise the motion should [5] be denied. In no case will the conclusion of the trial judge in disposing of the motion be revised by this court, except for manifest abuse of discretion. The motion for a new trial in this case was determined by a judge other than the [6] one who presided at the trial. In such a case the judge is in no better position to determine the motion than is this court. Our office in this case, therefore, is not to determine whether the judge was guilty of an abuse of discretion in deny-

ing the motion, but whether the evidence as it is presented in the printed record preponderates decisively against the verdict. (*Gibson v. Morris State Bank, supra.*) Having carefully examined the evidence, keeping in mind the limitations of the rule announced in the case just cited, we are of the opinion that it does not preponderate against the conclusion of the jury that Mrs. Shannon wrongfully ejected plaintiff, and is therefore liable to her for compensatory damages.

As remarked by the judge in determining the motion for a [7] new trial, the order to get out of the room, which also meant to leave the hotel, was addressed by Mrs. Shannon to the plaintiff, as well as to her husband, and operated as a wrongful ejection of her, as well as the husband, though she dressed and accompanied him at his suggestion. Mr. Shannon was not present and knew nothing of what occurred until next morning. Yet it cannot be controverted that Mrs. Shannon sustained toward him the relation of servant or agent, and for present purposes it is immaterial which relation she sustained. Therefore he is liable also. It is elementary that the principal is liable in damages for wrongs done by the agent while in the discharge of the duties intrusted to him by the principal, even though the latter is ignorant of them.

As to exemplary damages: In this character of action the defendant is liable to respond in exemplary damages, when it [8] appears that he has been guilty of malice, actual or presumed, in committing the wrong rendering him liable for compensatory damages. (Rev. Codes, sec. 6047.) "The words 'malice' and 'maliciously' import a wish to vex, annoy or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law." (Rev. Codes, sec. 8099.) We think that the jury were justified in presuming that the conduct of Mrs. Shannon was actuated by a malicious motive. If the plaintiff and her husband and companions were not creating a disturbance—and we must assume that the jury found that they were not—she had no right to enter their rooms as she did. The order for them to vacate

the rooms and leave the hotel at that time of the night must necessarily have been a source of vexation and annoyance. This conduct, coupled with that exhibited by Mrs. Shannon in the lobby in exacting payment for the rooms and breakfast, which under the circumstances she clearly had no right to exact, is sufficient to warrant the presumption that she was prompted by a malicious motive, within the meaning of the statute, *supra*, and fully justified the jury in awarding exemplary damages as against her. As in an action for malicious prosecution, if the evidence discloses the want of probable cause, the jury may infer malice, so by parity of reasoning the ejection of the plaintiff, appearing to have been without reason or excuse, accompanied by the perpetration of the further wrongful exaction of payment of an unlawful demand, furnished the basis for the presumption that her conduct throughout was prompted by malice. (*Martin v. Corscadden*, 34 Mont. 308, 86 Pac. 33; *Gronud v. Lossel*, 48 Mont. 274, 136 Pac. 1069.)

Counsel contend that, since the evidence discloses that W. F. Shannon was not present and took no part in the trespass upon plaintiff's rights, and did not thereafter ratify Mrs. Shannon's [9] acts, her malice was not imputable to him, and therefore the verdict against him for exemplary damages cannot stand. They contend, further, that, since the plaintiff elected to sue the husband and wife jointly, she elected to waive exemplary damages if she could not recover them against both. We think the first contention should be sustained. The courts in some of the states announce the broad doctrine that a principal is liable in exemplary damages for the acts of his agent, however tortious and wrongful, when they are done in the regular course of business, without regard to whether they were previously authorized or subsequently ratified by the principal. (*Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40; *Goddard v. Grand Trunk Ry.*, 57 Me. 202, 2 Am. Rep. 39.) The courts in other states hold to what seems to us the better rule: That a principal may not be held accountable for the malignant motives of his agent, unless it appears that he

authorized the act on account of which recovery is sought, or that he participated in the commission of it or subsequently ratified it. (*Burns v. Campbell*, 71 Ala. 271; *Becker v. Dupree*, 75 Ill. 167; *Nightingale v. Scannell*, 18 Cal. 315; *Lightner Min. Co. v. Lane*, 161 Cal. 689, Ann. Cas. 1913C, 1093, 120 Pac. 771.)

It is true that we held in the case of *Grorud v. Loss*, 48 Mont. 274, 136 Pac. 1069, that the malicious motives of an officer of a corporation while acting in its behalf are imputable to the corporation. We also held in the case of *Burles v. Oregon Short Line Ry. Co.*, 49 Mont. 129, Ann. Cas. 1916A, 873, 140 Pac. 513, that a corporation is liable in exemplary damages for the willful and malicious acts of one of its servants. A corporation, however, is an artificial person, and can only act through agents; and if the malignant motives of the agent are not imputable to it, it would necessarily follow that it could not be held liable for the malicious acts of its agents in any case. The corporation cannot, as a natural person, participate in any maliciously wrongful act, and it is not to be supposed that the board of directors—the executive body of the corporation—would by a formal resolution authorize such an act or by the same method ratify it. In the *Grorud Case*, the president of a corporation had instituted a baseless criminal prosecution against the plaintiff for the alleged theft of money of the corporation. If the malice of the president could not be imputed to the corporation, it could not have been held liable at all, and the only recourse of the plaintiff would have been against the president. In that case the question of exemplary damages did not arise.

In the case of *Burles v. Oregon Short Line Ry. Co.*, however, it was distinctly held that, where the act of the servant was prompted by a willful disregard of the rights of the plaintiff, his motive was properly imputable to the company. A natural person can act for himself, and therefore the malignant motive of another should not be imputed to him unless, under the rule of the cases cited above, he directly or indirectly authorized

or subsequently ratified the wrongful act. It seems to us that, whatever may be assigned as the foundation for it, a clear distinction is to be recognized between a corporation and a natural person, when we come to fix responsibility for the acts of their agents.

Now, it is not controverted that Mr. Shannon was not present when the plaintiff was ejected; nor is there any evidence [10] that he knew what Mrs. Shannon's intention was when she went up to the room of plaintiff. Nor, again, is there any evidence that he ratified her act. The evidence does not go any further than to show that she was authorized to supervise the conduct of the guests of the house, and eject anyone who by his conduct created a disturbance and thus trespassed upon the rights of other guests. True, Mr. Jones testified that on the next morning he informed Mr. Shannon that the party had been ordered out, whereupon the latter stated that Mrs. Shannon had authority for that purpose. This statement, however, falls short of showing that he had knowledge of the attendant circumstances without which there could be no such ratification as would subject him to the imputation of malice. (*Weidenaar v. New York L. Ins. Co.*, 36 Mont. 592, 94 Pac. 1; 1 Am. & Eng. Ency. of Law, 2d ed., 965.) Malice of the agent may not be imputed to the principal merely from the fact that the agent did the wrongful act complained of. (*Haines v. Schultz*, 50 N. J. L. 481, 14 Atl. 488; *Eviston v. Cramer*, 57 Wis. 570, 15 N. W. 760; *State v. Mason*, 26 Or. 273, 38 Pac. 130; *Krug v. Pitass*, 162 N. Y. 154, 76 Am. St. Rep. 317, 56 N. E. 526; *Davis v. Hearst*, 160 Cal. 143, 116 Pac. 530; *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97, 13 Sup. Ct. Rep. 261.)

It does not follow, however, that because plaintiff joined the defendants in the one action, she should be held to have waived her right to recover exemplary damages against Mrs. Shannon [11] on the ground that Mr. Shannon is not also liable. Under the instructions of the court, the jury found and assessed exemplary damages against the two defendants separately.

Since the evidence justified the finding against both for compensatory damages, and against Mrs. Shannon for exemplary damages, we do not think that the verdict should be set aside, except as to the exemplary damages awarded against Mr. Shannon. Though it will be perhaps somewhat difficult to formulate a judgment allowing a recovery against both for compensatory damages and for exemplary damages against Mrs. Shannon only, it is not impracticable to do so. Under our liberal practice there seems to be no reason why the prevailing party may not, in this form of action, have judgment against all the defendants for the amount awarded jointly against all, and against one for an additional amount awarded separately against him, where the evidence, as in this case, warrants it. This practice has been approved by courts in other jurisdictions. (*Mauk v. Brundage*, 68 Ohio St. 89, 62 L. R. A. 477, 67 N. E. 152; *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75, 94 S. W. 1076; *Nelson v. Halvorson*, 117 Minn. 255, Ann. Cas. 1913D, 104, 135 N. W. 818.)

It is contended that the court erred in submitting instruction No. 6. This instruction authorized the jury to award exemplary damages against Mrs. Shannon, if they believed that she acted maliciously, and also against W. F. Shannon, if they found that with full knowledge of the facts and circumstances he ratified and approved her acts. There is no merit in this contention.

It is insisted that the court erred in admitting evidence of [12] what occurred in the lobby after the plaintiff and her husband started to leave the hotel. What transpired there was a part of the whole occurrence, which began in plaintiff's room and ended only when she had finally reached the street. There was no error.

It is earnestly argued that the verdict is so excessive as to indicate that it was given under the influence of passion and prejudice. This case, however, falls within that class of cases in which the amount to be awarded rests entirely in the discretion of the jury, and their conclusion may not be revised, unless

the result of their deliberations is such as to shock the conscience and understanding. It is true that the amount awarded is large; yet we may not overlook the fact that the ejection of plaintiff was wholly without justification, that she was forced to leave the hotel at a late hour of the night, that she was finally compelled to go to the house of a friend because she could not find accommodations at any other hotel, that she suffered the humiliation inseparable from such an occurrence, and that she was made ill by the nervous condition induced by it, which continued throughout the night and the following week. Considering all these facts, we do not feel justified in concluding that the award was the result of passion and prejudice indulged by the jury, rather than of their calm deliberate judgment.

There is no standard of measurement by which to determine the amount of damages to be awarded, other than the intelligence of the jury, made up of impartial men governed by a sense of justice. To the jury, therefore, is committed the exclusive task of examining the facts and circumstances of each case and valuing the injury and awarding compensation in the shape of damages. "The law that confers on them this power, and exacts of them the performance of the solemn trust, favors the presumption that they are actuated by pure motives. It therefore makes every allowance for different dispositions, capacities, views, and even frailties in the examination of heterogeneous matters of fact, where no criterion can be applied; and it is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose." (1 Graham & Waterman on New Trials, p. 451.)

We have examined the other contentions made by counsel, but find no merit in them.

As to Mrs. Shannon, the order is affirmed. As to W. F. Shannon, the cause is remanded, with directions to the district court to grant him a new trial unless, within twenty days after the

*remittitur* is filed in that court, the plaintiff remit the amount of exemplary damages awarded against him. If such remission is made, the order will stand affirmed as to him also.

MR. JUSTICE SANNER and MR. JUSTICE HOLLOWAY concur.

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LEE, RESPONDENT, v. LAUGHERY, APPELLANT.

(No. 3,937.)

(Submitted September 17, 1918. Decided October 28, 1918.)

[175 Pac. 873.]

*Real Property—Quieting Title—Ejectment—Deeds—Recordation—Acknowledgment—Bill of Exceptions—Certificate—Judgments—Surplusage.*

**Quieting Title—Complaint—Contents.**

1. To state a good cause of action in a suit to quiet title, plaintiff must allege either possession by himself or the fact that the land in question is unoccupied.

**Deeds—Recordation of Instruments—Constructive Notice.**

2. In order that the record of an instrument shall impart constructive notice, the writing must be one which the law authorizes to be recorded.

[As to instruments void on face as entitled to record, see note in *Ann. Cas.* 1912C, 675.]

**Same—Acknowledgment by Whom.**

3. To entitle an instrument to record, under section 4646, Rev. Codes, it must be acknowledged by the party who is bound by it to the performance of an act, acknowledgment by the party to whom he is bound being of no avail, and record of it in the latter case imparts no constructive notice whatever.

**Same—Consideration—Burden of Proof.**

4. A deed to land furnishes presumptive evidence of a consideration, and the burden of showing want of consideration sufficient to support it is upon him who seeks to invalidate it or avoid its effect.

**Appeal and Error—Bill of Exceptions—Certificate—Effect.**

5. Where the record on appeal recites that a deed was offered and received in evidence, but the instrument is absent from the transcript, a recital in the certificate that the bill of exceptions contains all the evidence is of no avail in face of the affirmative showing that it does not.

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On sufficiency and necessity of possessory title to enable one to bring action to quiet title, see note in 46 L. B. A. (n. s.) 502.



Judgments—Correct Result—Wrong Theory—Surplusage.

6. Where the correct result was reached in an action involving title to real property, it is immaterial that the court adopted a wrong theory, and, the judgment being sufficient, any unnecessary recitals in it will be treated as surplusage.

*Appeal from District Court, Carbon County; Geo. W. Pier-son, Judge.*

ACTION by Levi T. Lee against Thomas E. Laughery. Judgment for plaintiff. From an order denying him a new trial, defendant appeals. Affirmed.

*Messrs. Grimstad & Brown*, for Respondent, submitted a brief; *Mr. L. A. Brown* argued the cause orally.

Addressing ourselves to the proposition as advanced by appellant that the instruments are a mortgage rather than a conditional sale, we submit the following authorities that the trial court in its conclusions was right and that the instrument in question was nothing more than a conditional sale and, therefore, after December 19, 1911, Laughery had no further interest in the premises. (2 Devlin on Real Estate, 3d ed., 1112; *Williams v. Owen*, 10 Sim. 386, 59 Eng. Reprint, 664; *Cowell v. Craig*, 79 Fed. 685; *Alderson v. White*, 2 De Gex & J. 97, 44 Eng. Reprint, 924; *McNamara v. Culver*, 22 Kan. 661; *Hurst v. Beaver*, 50 Mich. 612, 16 N. W. 165; *Davis v. Thomas*, 1 Russ. & M. 506, 39 Eng. Reprint, 195; *Tapply v. Sheather*, 8 Jur. N. S. 1163; *Goodman v. Grierson*, 2 Ball & B. 274; *Shaw v. Jeffrey*, 13 Moore P. C. C. 432, 15 Eng. Reprint, 162; *Green v. Butler*, 26 Cal. 595; *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251; *Smith v. Hoff*, 23 N. D. 37, Ann. Cas. 1914C, 1072, 135 N. W. 772; 5 Elliot on Contracts, sec. 4609.)

Under statutes identical with section 6870, Revised Codes, it is not necessary for plaintiff to be in possession in order to bring an action to quiet title. (*Burleigh v. Hecht*, 22 S. D. 301, 117 N. W. 367; 17 Eng. Pl. & Pr. 290, 313.)

The evidence discloses the fact that Longley went into possession of this property, and that at the time of the commencement

of the action Laughery was on the land by virtue of a lease from Longley. Longley then being in possession of the premises, and Laughery being his tenant, it was incumbent upon Laughery, before he could question the title of Longley, or any of those to whom Longley had deeded the premises, to satisfy the mortgage, if it was a mortgage. (*Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375.)

The fact that Laughery stood by and helped sell the property and that he was in possession of the place by virtue of a lease from Longley, and the further fact that he filed a mechanic's or materialman's lien against the property, is strong proof that Mr. Laughery at that time understood the property to belong to Longley and not to him. (*Robitaille v. Boulet*, 53 Mont. 66, 161 Pac. 163; *Harrington v. Butte & Superior Copper Co.*, 52 Mont. 263, 157 Pac. 181; *Dunne v. Yund*, 52 Mont. 24, 155 Pac. 273; *Riley v. Blacker*, 51 Mont. 364, 152 Pac. 758.) Some courts have gone so far as to hold that before a deed can be declared to be an equitable mortgage, there must exist a debt which must be personal in its nature, and enforceable against the person independently of the security. (*Voris v. Robbins*, 52 Okl. 671, 153 Pac. 120.)

When a purchaser searches the records until he finds a deed by which his grantor acquired title, he is not bound to look for deeds of an antecedent grantor recorded after the deed to his grantor. The recording of a deed is constructive notice only to subsequent purchasers under the same chain of title. (*Morse v. Curtis*, 140 Mass. 112, 54 Am. Rep. 456, 2 N. E. 929; *Calder v. Chapman*, 52 Pa. St. 359, 91 Am. Dec. 163; *Hill v. McNichol*, 76 Me. 314; *Day v. Clark*, 25 Vt. 397; *Carbine v. Pringle*, 90 Ill. 302; *Corbin v. Sullivan*, 47 Ind. 356; *Shackleton v. Allen Chapel African M. E. Church*, 25 Mont. 421, 65 Pac. 428; *Chowen v. Phelps*, 26 Mont. 524, 69 Pac. 54; *Hughes v. Davis*, 40 Cal. 117.)

*Messrs. Nichols & Wilson* and *Messrs. Walsh, Nolan & Scalton*, for Appellant, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

From the appellant's standpoint, the action which should have been instituted was an action to foreclose the mortgage. From the standpoint of the respondent, insisting that the deed was absolute under the conditions existing, the action should have been ejectment. The motion for a nonsuit should have been granted, as Laughery being in possession, the action to quiet title cannot be maintained. (*Wolverton v. Nichols*, 5 Mont. 89, 2 Pac. 308; *Sklower v. Abbott*, 19 Mont. 228, 47 Pac. 901; *O'Hanlon v. Ruby Gulch Mining Co.*, 48 Mont. 65, 135 Pac. 913.)

A *bona fide* purchaser is one who, at the time of his purchase, advances a new consideration, surrenders some security or does some other act which leaves him in a worse position should his purchase be set aside, and purchases in the honest belief that his vendor had a right to sell without notice, actual or constructive, of any adverse rights, claims, interests or equities of others in and to the property sold. (*Foster v. Winstanley*, 39 Mont. 314, 102 Pac. 574.)

The plea of estoppel, which for the first time is set forth in the reply, is so defectively set forth that facts are not stated to make it available as a basis on which to found title. Estoppel must be pleaded. (*Stafford v. Hornbuckle*, 3 Mont. 485; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *City of Butte v. Mikosowitz*, 39 Mont. 350, 102 Pac. 593; *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049; *Conrow v. Huffine*, 48 Mont. 437, 138 Pac. 1094; *Smith v. Barnes*, 51 Mont. 202, Ann. Cas. 1917D, 330, 149 Pac. 963.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In March, 1910, W. A. Longley agreed to convey to Thomas E. Laughery nineteen lots in Laurel, and, in consideration thereof, Laughery agreed to convey to Longley the Miller ranch in Carbon county. Longley made his conveyance, but Laughery, being unable at the time to comply with his part of the contract, conveyed to Longley another ranch known as the "Laughery"

ranch. The conveyance was by deed absolute in form. At the same time an agreement in writing was entered into between these parties, which recited in effect that the Laughery ranch had been transferred as security for the performance by Laughery of his obligation under the original agreement, and further provided that if Laughery should acquire title in fee simple to the Miller ranch and tender a deed therefor or the cash equivalent, on or before December 19, 1911, then the tender should be accepted and Longley should thereupon deed back the Laughery ranch. This agreement was signed by both parties, was acknowledged by Laughery only, and was filed for record and recorded on February 20, 1912. In the meantime Laughery leased the Laughery ranch from Longley, and Longley on January 29, 1912, sold the same ranch to the Yellowstone Land & Grain Company. On March 9, 1912, the Yellowstone Land & Grain Company conveyed the Laughery ranch, by warranty deed, to plaintiff, Lee. Laughery thereafter asserted title to the land, and this action was instituted.

The complaint contains two so-called causes of action—one to quiet title, the other in ejectment. The answer contains certain admissions and denials not now material, and an affirmative defense in which is recited the transactions between Longley and Laughery, followed by allegations to the effect that the deed and contract constituted a mortgage, that no proceedings for its foreclosure had been instituted, and that the Laughery ranch was at all times of much greater value than the Miller ranch. There was reply to the new matter, and upon a trial to the court without a jury the issues were determined in favor of plaintiff. From an order denying him a new trial, defendant appealed.

The findings made by the lower court refer to the deed and contract, to the conveyance to the Yellowstone Land & Grain Company, and to the deed to plaintiff. There is a finding that plaintiff obtained title without notice of any claim by defendant except such as might have been conveyed by defendant's possession; that defendant had secured a lease of the Laughery ranch from Longley; and that he had not performed or offered

to perform the condition imposed upon him by the contract. The court concluded:

(1) That the contract between Longley and Laughery was an agreement on the part of Longley to reconvey on condition to be performed by Laughery within a specified time, and that, by reason of Laughery's failure to perform or offer to perform, he could not assert any claim to or interest in the Laughery ranch.

(2) That defendant had held possession by virtue of a lease.

(3) That the leasehold interest had terminated; and

(4) That plaintiff is owner of the Laughery ranch, and his title thereto should be quieted.

The judgment establishes title and right of possession in plaintiff and awards him possession and his costs. It then proceeds to declare that the claim of defendant is invalid, and he is enjoined from further asserting it.

1. The complaint does not state a cause of action to quiet title.

[1] It is nowhere alleged that plaintiff is in possession or that the land is unoccupied. If the Laughery ranch was held adversely to plaintiff, then ejectment furnished a plain, speedy and adequate remedy. Either possession by plaintiff or the fact that the land is unoccupied is an essential ingredient of the action to quiet title (*Montana Ore Pur. Co. v. Boston & Montana Co.*, 27 Mont. 288, 70 Pac. 1114; *O'Hanlon v. Ruby Gulch Min. Co.*, 48 Mont. 65, 135 Pac. 913); and it is necessary that the one fact or the other be made to appear by appropriate allegation (32 Cyc. 1352). In the so-called second cause of action, it is alleged that defendant is in possession, and this of itself is sufficient to defeat plaintiff's right to relief in equity.

2. There are in the complaint sufficient allegations to state a cause of action in ejectment, and it is not contended, and could not be, that plaintiff did not make out a *prima facie* case upon that theory. When Laughery conveyed the land to Longley by deed absolute in form, he placed it within the power of Longley to convey a fee-simple title to anyone who paid value without notice of Laughery's outstanding claim, and upon the pleadings and undisputed evidence the court had before it, at the close of

plaintiff's case, a perfect chain of title from Laughery to Lee, and therefore plaintiff acquired an absolute title, even though the land was encumbered by mortgage, unless he had notice of the mortgage.

3. The burden was upon the defendant to overcome this *prima facie* case, and this he sought to do, first, by an attempt to show that Lee purchased with actual knowledge of the outstanding equity; but upon the conflicting testimony the trial court determined the issue in plaintiff's favor, and the evidence fully sustains the finding.

4. In the second place, defendant relied upon the recordation of the Longley-Laughery contract as imparting constructive notice. By the terms of that agreement Longley was the party to be charged. He agreed that if a tender was made of a sufficient deed to the Miller ranch, or its cash equivalent, he would accept the tender and reconvey the Laughery ranch. It is [2] elementary that, in order that the recordation of an instrument shall impart constructive notice, the instrument itself must be one which the law authorizes to be recorded. Section 4646, [3] Revised Codes, provides that, before an instrument can be recorded, its execution must be acknowledged by the person executing it. (The exceptions to the rule are not involved here.) According to defendant's own theory, he conveyed the Laughery ranch to Longley by deed absolute, received back Longley's contract to reconvey, and that the two instruments constituted a mortgage. Laughery's signature to the contract added nothing to it, and his acknowledgment of its execution was equally without force or effect. We have presented a case analogous to that of a deed acknowledged by the grantee alone. Since Longley was the party bound by the contract, he was the "party executing it," within the meaning of section 4646 above; and, since he did not acknowledge its execution, it was not entitled to be recorded, and its recordation imparted no constructive notice whatever. (*Baum v. Northern Pac. Ry. Co.*, ante, p. 219, 175 Pac. 872.)

The record lends much support to the court's conclusion that the Longley-Laughery contract was merely an agreement on the part of Longley to reconvey upon condition to be performed by Laughery within a given time; but defendant's position is not improved, if we accept his theory that the deed and contract constituted a mortgage, since plaintiff had no notice, actual or constructive, of the existence of such mortgage.

5. It was not necessary for plaintiff to prove, in the first instance, that he paid an adequate consideration for the Laughery [4] ranch. The deed from his grantor furnished presumptive evidence of a consideration (secs. 5010 and 7962 [39], Rev. Codes), and the burden of showing want of consideration sufficient to support it was upon the defendant who sought to invalidate it, or to avoid the effect it otherwise would have (sec. 5011, Rev. Codes). It does not appear from plaintiff's testimony that he did not pay an adequate consideration, and defendant offered no evidence on the subject.

6. It is suggested by appellant that there is not any evidence [5] that Lee's deed was ever recorded. The record recites that his deed was offered and received in evidence, but it is not contained in the transcript. If it were before us, it would doubtless disclose whether it had been recorded. The burden of preparing the bill of exceptions was upon defendant in the lower court, and the burden of showing error is upon him in this court. The recital in the certificate that the bill of exceptions contains all the evidence cannot avail in the face of an affirmative showing that it does not.

7. It cannot be said that this cause was tried as a suit in [6] equity. The record is equally consistent with the theory that plaintiff relied upon his complaint in ejectment and defendant upon his equitable defense; and even though it be conceded that the trial court erred in its theory in deciding the case—and this is not entirely clear—the record discloses that the same result must have been reached if a correct theory had been adopted. In other words, upon the record made, the plaintiff was entitled to a judgment that he is the owner of the Laughery

ranch, entitled to its possession and to his costs; and, since the judgment is sufficient, any additional recitals in it should be treated as surplusage.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY CONCURS.

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WILCOX, APPELLANT, v. SCHISLER ET AL., RESPONDENTS.

(No. 3,935.)

(Submitted September 17, 1918. Decided November 4, 1918.)

[175 Pac. 889.]

*Contracts—Mortgages—Fraud—Defenses—Evidence—Equity—  
Jury Trial—Special Findings—General Verdict.*

*Equity—Jury Trial—Special Findings—General Verdict.*

1. Where a jury is called in an equity case to assist in the determination of controverted questions of fact, the trial judge should not submit a general verdict to them, but require them to make special findings in response to interrogatories propounded.

*Fraud—Contracts—When Relief not to be Granted.*

2. Neither law nor equity will grant relief to one who enters into a written contract without reading it, if the other party to it is not guilty of deceit or false representations as to its contents by means of which the plaintiff is put off his guard.

[As to carelessness as a bar to relief from fraud, see note in 32 Am. St. Rep. 384.]

*Same—Defenses.*

3. A person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that, had not the other party been so ignorant and negligent, he could not have succeeded in deceiving him.

*Same—Mortgage Foreclosure—Defenses.*

4. In a suit to foreclose a mortgage, evidence held to support a finding that it and the promissory note which it secured were procured by the fraud of plaintiff's brother and uncle of defendant, with plaintiff's knowledge.

*Same—Transaction With Deceased Person—Evidence—Admissibility.*

5. In a suit to foreclose a mortgage alleged to have been procured by the fraud of plaintiff's associate, since deceased, defendant could

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On failure to read contract as affecting right to relief therefrom on the ground of fraud of other party, see notes in 6 L. E. A. (n. s.) 463; L. E. A. 1917F, 637.



not be rendered incompetent to testify as to transactions with the associate by the unsupported assertion that he was plaintiff's agent and that therefore, under subdivision 4 of section 1, Chapter 41, Laws of 1913, evidence of declarations made by or communications had with such agent was inadmissible.

*Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.*

ACTION by Mary A. Wilcox against Helen Schissler and another to foreclose mortgage. From a judgment for defendants and denial of a new trial, plaintiff appeals. Affirmed.

*Messrs. Goddard & Clark and Mr. E. E. Collins*, for Appellant, submitted a brief; *Mr. O. F. Goddard* argued the cause orally.

The evidence shows that the plaintiff took no part whatever in any false or fraudulent representations made by Eugene F. Gateley, and no hint is suggested that the plaintiff had any knowledge that any false representations were being made. Personally, she was innocent, and declared to be so by the defendants themselves. The burden of proving fraud is always upon the one alleging it. (*Robinson v. Glass*, 94 Ind. 211, 221; *Thatcher v. Edsall*, 2 Cal. Unrep. 331, 4 Pac. 202; *Lowe v. Higginbotham* (Kan.), 13 Pac. 790; *Lindsay v. Kroeger*, 37 Mont. 231, 95 Pac. 839; *Harrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102.)

The court erred in overruling plaintiff's objection to questions propounded by defendants' counsel to the witness Helen Schissler, whereby she was permitted to testify to conversations had between Gateley, who was then deceased, and who was at the time of the making of the alleged misrepresentations acting as general agent for the plaintiff, which conversations were had without the presence of the plaintiff and of which she had no knowledge. (Laws 1913, Chap. 41.) The statute applies to communications and transactions concerning written documents, as well as to verbal transactions with or statements by the deceased. (*Mattoon v. Young*, 45 N. Y. 696; *Hedges v. Williams*,

26 Tex. Civ. 551, 64 S. W. 76; *Shelden v. Michigan etc. Fire Ins. Co.*, 124 Mich. 303, 82 N. W. 1068.)

Where a party claiming to have been deceived to his prejudice by false representations has investigated for himself or the means were at hand to ascertain the truth or falsity of any representations made to him, his reliance thereon afford no ground for relief. Mere verbal representations of what a written contract contains, when the written contract is in the hands of the party to be bound, do not affect the liability of such parties if they sign the written contract. (*Bedell v. Herring*, 77 Cal. 572, 11 Am. St. Rep. 307, 20 Pac. 129; *Grinrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891, at 894; *McCormick v. Hubbell*, 4 Mont. 87, 5 Pac. 314; *Pierce v. Ten Eyck*, 9 Mont. 349, 23 Pac. 423, 424; *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; *Thatcher v. Edsall*, 2 Cal. Unrep. 331, 4 Pac. 202; *Slaughter's Admr. v. Gerson*, 80 U. S. 379, 20 L. Ed. 627; *Osborne v. Missouri Pac. Ry. Co.*, 71 Neb. 180, 98 N. W. 685; *Cagney v. Cuson*, 77 Ind. 494; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. Ed. 931, 12 Sup. Ct. Rep. 164; *Long v. Warren*, 68 N. Y. 426.)

*Mr. E. E. Enterline* and *Messrs. Johnston & Coleman*, for Respondents, submitted a brief; *Mr. Enterline* argued the cause orally.

Because of the fact that a trick or artifice was resorted to by Gateley for the purpose of preventing respondents from reading the note and mortgage or having the contents explained to them by the notary; and because confidential relations existed between Gateley and the respondents which excused respondents from reading the note and mortgage and which permitted them to rely upon the statements made by Gateley concerning their contents,—the rule contended for by appellant, does not apply. (See *Wells v. Adams*, 88 Mo. App. 215; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85; *Castenholz v. Heller*, 82 Wis. 30, 51 N. W. 432; *Stevens v. Reilly* (Okl.), 156 Pac. 157; *Smith & Co. v. Kimble*, 31 S. D. 18, Ann. Cas. 1916A, 497, 139

N. W. 348; *Graham v. Thompson*, 55 Ark. 296, 299, 29 Am. St. Rep. 40, 18 S. W. 58; *Lotter v. Knospe*, 144 Wis. 426, 129 N. W. 614; 20 Cyc. 34.)

The evidence showing the relationship between the parties is undisputed and the trust and confidence reposed in Gateley as testified to by respondents are not controverted. Under the facts and circumstances as disclosed by the record in this case and from the principles announced in the foregoing authorities the respondents cannot be legally held liable upon the note and mortgage in question.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought to obtain foreclosure of a mortgage upon lands situate in Yellowstone county, alleged to have been executed by defendants to plaintiff on September 21, 1908, to secure the payment of a promissory note for \$1,296. The note is of even date with the mortgage, and by its terms is made payable two years thereafter, with interest at the rate of ten per cent per annum, payable annually. The plaintiff also seeks recovery of taxes on the lands, which she alleges she paid for the years 1909-1914, inclusive, with interest on each payment from the date thereof, and to have the several payments, with the interest thereon, declared a charge upon the lands, to be paid out of the proceeds derived from their sale. In their separate answers the defendants, after denying the material allegations of the complaint, allege two defenses: (1) That they were induced to execute the note and mortgage set forth in the complaint by false and fraudulent representations, made to them by one Eugene T. Gateley, which they believed, and upon which they relied, that the instruments which they were signing were merely a guaranty that they would at a subsequent date execute to him a lease upon the lands described in the mortgage, and that plaintiff acted in concert and connivance with Gateley in order to secure the execution of the note and mortgage to herself. (2) That the note and mortgage were wholly without considera-

tion, in that neither of the defendants, at the time of their execution or at any other time, received from the plaintiff the sum of \$1,296, or any part thereof, or any other consideration whatever. Plaintiff by reply joined issue on these affirmative defenses. The trial court submitted the issues thus framed to a jury which returned a general verdict in favor of the defendants. Plaintiff has appealed from the judgment entered thereon, and from an order denying her motion for a new trial.

Before taking up the contentions made by counsel for plaintiff, [1] we remark that this case is one of strictly equitable cognizance. It was therefore exclusively the province of the trial judge to find the facts and declare the rights of the parties. It was proper for him, if he deemed it desirable to do so, to call a jury to his assistance, in an advisory capacity, upon controverted questions of fact, the solution of which depended upon the credibility of the witnesses. Having called the jury, however, he should have required them to make special findings of fact in response to interrogatories propounded to them, but should not have submitted a general verdict. (*Bordeaux v. Bordeaux*, 43 Mont. 102, 115 Pac. 25; *Lenahan v. Casey*, 46 Mont. 367, 128 Pac. 601; *Moss v. Goodhart*, 47 Mont. 257, 131 Pac. 1071.) From the fact that we find nothing in the briefs of counsel on either side touching the character of the case, we may presume that they regarded it as one at law. For the purposes of these appeals, therefore, we shall accept their theory of it, and determine the merits of the appeals accordingly.

The principal assignment argued by counsel is that the evidence is insufficient to justify the verdict. The plaintiff being sworn in her own behalf, testified that in 1906 she was living in Chicago; that she and Eugene T. Gateley, her brother, had come out to Montana in September of that year to make homestead entries upon the public lands; that the defendant Helen Schisler, her niece, then Helen Saunders, desiring to acquire lands in the same way, plaintiff loaned her money for her railroad fare to Montana and to pay her filing fees in the land office; that plaintiff also advanced her enough money to make the improve-

ments necessary to enable her to acquire patent and to bear her living expenses during her residence on the land; that the moneys advanced to her, except that for railroad fare, were paid by plaintiff through Gateley; that on September 21, 1908, when she was ready to commute her homestead, she came to Billings, where plaintiff then was; that plaintiff paid to the receiver of the land office \$486, the amount due the government; that plaintiff, with the two defendants and Gateley, then went to the office of R. E. Noyes, an attorney, where the defendants executed the note and mortgage and delivered them to her, the principal of the note representing all the various sums advanced to Helen Schissler; and that plaintiff then filed the mortgage for record with the county clerk.

There were introduced and read to the jury the depositions of Eleanor W. Gateley, another niece of plaintiff, and Mr. Noyes, the attorney, for the purpose of corroboration; but neither disclosed anything of evidentiary value, Mr. Noyes not having any recollection as to who was present or what transpired when the instruments were executed.

Helen Schissler gave the following narrative of the facts relating to the execution of the note and mortgage: "Early in December, 1906, she came to Billings, Yellowstone county, for the purpose of making a homestead entry of the lands described in the mortgage. This was in pursuance of an agreement between her and her uncle, Gateley, that he was to pay the entry fees, bear the expense of the improvements necessary to enable her to secure patent, and, when the time came to make final payment to the government, to furnish the money for the purpose. In return for these advancements by him, he was to have the use of the lands until patent should issue, and then a lease of them for three years; he to pay the taxes during the term. She took up her residence on the lands in May, 1907. Gateley made the promised advancements. On September 21, 1908, having made the required proof, she was permitted to make commuted entry upon payment of \$486 in cash. In the meantime she had married her codefendant. In order to make the payment, she

came with her husband to Billings, where Gateley and the plaintiff then were. Late in the afternoon Gateley met her and her husband at a hotel where they were stopping, and represented to them that, though he had every confidence in her, since she was married it would be necessary that they should give him a written guaranty that the lease would be executed upon the issuance of the patent as she had agreed. He explained to them that the guaranty had already been drafted by an attorney (Mr. Noyes) for their signatures, but that it would not appear of record. He thereupon requested the two to accompany him to the office of Mr. Noyes. When they reached the office, Mr. Noyes presented to them for their signatures two papers, which they subsequently ascertained were the note and mortgage. He inquired of them if they were acquainted with the contents of the papers. Gateley thereupon interposed, and, answering for them, said: "Yes, yes; I have explained it all to them. We must hurry and get to the land office before it closes." Mrs. Schissler also told the attorney that her uncle had explained the papers to them. Thereupon, without reading them, they signed the note and mortgage and acknowledged the latter, relying upon Gateley's statement as to the purpose to be served by them. He then told them to go to the land office, where they would meet the plaintiff, to whom he had given the money to make final payment, telling Mrs. Schissler at the same time that he deemed it unsafe for her to carry it with her. As they were leaving him, she inquired of him what was the purpose of the small piece of paper (the note) which he had required her and her husband to sign. He replied that it was "merely a form, merely forfeiture for the land and improvements if I did not live up to my agreement with him." At the land office they met plaintiff, who paid the receiver the money and took the receipt. Mrs. Schissler allowed plaintiff to take the receipt, because she supposed plaintiff would desire to show Gateley that she had made proper disposition of the money he had intrusted to her. The final certificate of entry was issued to Mrs. Schissler on November 30 thereafter. On December 8 she executed a formal

lease to Gateley, in accordance with her agreement, for a term of three years for a consideration of \$1 and other "good and sufficient considerations to him [her] in hand paid and to be paid." Under this lease he held possession until his death on January 18, 1914. Mrs. Schissler, presuming that Gateley was paying the taxes according to the terms of his agreement with her, did not make any inquiry about them until after his death. Upon her offer to pay them for the year 1914, she was informed by the county treasurer that they had been paid by the plaintiff. She had no knowledge of the existence of the note and mortgage until about two months after the death of Gateley, when she learned of them by common report through a friend. No demand was ever made upon her by Gateley, nor by the plaintiff, for payment of the note or the annual interest until January 7, 1915, when demand for payment was made by plaintiff through one of her present counsel. Never at any time, either when Mrs. Schissler made her homestead entry or at any time thereafter, did she borrow or receive money from plaintiff in any amount or for any purpose, or have any money transactions with her, other than the payment of \$486 for the final entry; nor did she ever promise Gateley, or the plaintiff, that she would execute a note and mortgage to either of them for any purpose. She testified, further, that she was induced to sign the papers without reading them by her belief in and reliance upon the truth of Gateley's statements as to their purpose, that if she had known that the papers were a note and mortgage she would not have signed them, and that she left them with the attorney and never saw them again until they were shown to her during the trial.

The testimony of Mr. Schissler agreed in all substantial particulars with that of Mrs. Schissler with reference to the conversation had with Gateley at the hotel, the subsequent execution of the note and mortgage, the statements made by Gateley at that time and as they left the attorney's office, and the payment of the money at the land office by the plaintiff. He had never had any dealings with the plaintiff.

Starting out with the proposition that the burden of proving [2] fraud is upon him who alleges it, counsel assert that there is not a syllable of evidence tending to connect the plaintiff with any false representations made to the defendants by Gateley, or that she had any knowledge of them. This argument impliedly assumes that Gateley was guilty of a fraud upon the defendants. This assumption is clearly correct. It is the general rule that a party will not be relieved, either by a court of equity or a court of law, from the consequences of his own inattention and carelessness. If it appears that he who claims to have been deceived to his prejudice has investigated for himself, or that the means were in his hands to ascertain the truth or falsity of any representations made to him, he may not be granted relief on the ground that he has been misled to his prejudice. (*Grindrod v. Anglo-American Bond Co.*, 34 Mont. 169, 85 Pac. 891.) The rule applies to one who executes an instrument without reading it, when he has it in his hands and negligently fails to ascertain the contents of it; the other party not being guilty of any deceit or false representation as to its contents, by means of which he is put off his guard.

In ordinary business transactions parties are expected and required to use reasonable care and prudence, and not rely upon those with whom they deal to care for and protect their interests. (*Grindrod v. Anglo-American Bond Co.*, *supra*.) But, as said by Justice Cassoday, in *Warder etc. Co. v. Whitish*, 77 Wis. [3] 430, 46 N. W. 540: "Certainly no one will contend that a person can procure the signature of a party to a contract by false representations, and then enforce the contract on the ground that, had the party so deceived been more vigilant, he would have discovered the fraud in time to have withheld his signature from the contract. In other words, a person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that, had not the other party been so ignorant or negligent, he could not have succeeded in deceiving him." The rule thus stated has the sanction of the court generally. (*Como Orchard Land Co. v. Markham*, 54 Mont. 438,



171 Pac. 274; *Dashiel v. Harshman*, 113 Iowa, 283, 85 N. W. 85; *Lotter v. Knospe*, 144 Wis. 426, 129 N. W. 614; *Cummings v. Ross*, 90 Cal. 68, 27 Pac. 62; *Cole Bros. v. Williams*, 12 Neb. 440, 11 N. W. 875; *Krenz v. Lee*, 104 Minn. 455, 116 N. W. 832; *Western Mfg. Co. v. Cotton & Long*, 126 Ky. 749, 12 L. R. A. (N. S.), 427, 104 S. W. 758; *Smith v. Kimble*, 31 S. D. 18, Ann. Cas. 1916A, 497, 139 N. W. 348; *Albany Savings Inst. v. Burdick*, 87 N. Y. 40; *Stevens v. Reilly* (Okl.), 156 Pac. 157; *Graham v. Thompson*, 55 Ark. 296, 29 Am. St. Rep. 40, 18 S. W. 58.)

Accepting the testimony of the defendants as true—as did the jury—there can be no doubt, under the rule announced in the [4] cases cited above, that Gateley was guilty of a palpable fraud. He was the uncle of Mrs. Schissler. He had been advancing her money to enable her to secure title to her homestead, stipulating for the use of it before and after final entry to reimburse himself for his expenditures for her. Under the circumstances it was but natural that she had the utmost confidence in him and felt entirely secure in reposing trust in him. It was natural that she was ready to furnish him any guaranty demanded by him to show that she was ready to discharge her obligation to him; and when he requested herself and her husband to execute the contract for the lease, after explaining the purpose of it at the hotel, it would have been strange indeed that, when they were asked by Noyes if they knew the contents of the papers they were about to execute, and he interposed by saying that he had explained all to them, they should have stopped to read them or question the truth of his statement.

That the plaintiff was cognizant of the fraud is, we think, a legitimate inference from all the evidence. She was waiting at the land office to pay the receiver the money which had been intrusted to her by Gateley after the defendants had paid their visit to Noyes' office. She later received the note and mortgage. Add to this that Mrs. Schissler had not at any time obtained any money for any purpose from plaintiff, that plaintiff did not demand payment of the note or the annual interest for nearly five years after it fell due, and then only after the death of Gate-

ley, and the conclusion seems unavoidable that she had full knowledge of Gateley's fraud. Besides, she testified that she was present at Mr. Noyes' office when the papers were signed. There is a direct conflict between her statement and that of defendants on this point; but presuming, as we may, that the jury found that she was present and heard the representations made by Gateley, the doubt that we might otherwise entertain as to her knowledge of his fraud vanishes. Aside from these considerations, since she never advanced any money to Mrs. Schissler, the latter received no consideration for the note and mortgage. The verdict is justified by the evidence, either on the ground of fraud, or upon the ground that the note and mortgage were wholly without consideration.

Of the several other assignments, only one is of sufficient merit to deserve special notice. During her examination, Mrs. Schissler was permitted, over objection by plaintiff's counsel, to relate [5] the conversation Gateley had with her and her husband before they went to Mr. Noyes' office. The ground of the objection was that, since it appeared from the testimony of plaintiff that Gateley, then dead, had been the agent of plaintiff in her dealings with Mrs. Schissler, the latter was incompetent under the statute to testify to any conversation or transaction had with him. Section 7891, Revised Codes, as amended by Laws of 1913, Chapter 41, section 1, declares: "The following persons cannot be witnesses: \* \* \* 4. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against any person or corporation, as to the facts of direct transaction or oral communication between the proposed witness and the deceased agent, of such person or corporation, and between such proposed witness and any deceased officer of such corporation." The purpose of the legislature in enacting this provision was to declare a party dealing with an agent incompetent to testify as to any transaction or conversation had with the agent, in any action or proceeding against the principal, the effect of which would be to render the principal liable by reason of the particular act or

declaration of his agent. In other words, principals are given the same protection as is accorded to estates of deceased persons under subdivision 3 of the same Act, except that under subdivision 3 the executor or administrator waives his right to object if he introduces evidence of the transaction or communication, or it appears to the court that without the testimony of the witness injustice will be done, whereas subdivision 4 does not provide for any exception. As subdivision 3 applies only to parties to transactions and proceedings against an executor or administrator *eo nomine* in his official capacity only, subdivision 4 must necessarily apply to parties who seek to charge a principal by means of transactions or declarations of one who is known and admitted to be an agent of the principal. It certainly cannot be conceived that the legislature intended to declare that a party to an action may render the adverse party incompetent to testify, by his mere unsupported assertion that the person with reference to whose transaction or declaration the adverse party is questioned was his agent. All persons who come within the definition laid down in section 7890 of the Revised Codes are competent witnesses. Section 7891, as amended, declares the exceptions. This may not be extended by construction to include persons not falling within its express terms. From this point of view, Mrs. Schissler did not come within any of the exceptions and therefore was competent to testify. There is no merit in the contention.

The judgment and order are affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY concurs.

CRUSE ET AL., APPELLANTS, v. FISCHL, COUNTY TREASURER,  
RESPONDENT.

(No. 3,939.)

(Submitted September 18, 1918. Decided November 4, 1918.)

[175 Pac. 878.]

*Taxation—State and County Bonds—Constitutional Law—Statutes—Exemptions—Burden of Proof—"Property"—Public Policy.*

**Taxation—Exemptions—Constitution—Self-executing Provisions.**

1. The provision of section 2, Article XII, of the state Constitution, declaring that the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt, is self-executing, and denies the legislature authority to tax any property of that class.

**Constitution—Nature of Instrument—Authority of Legislature.**

2. Since the state Constitution is not a grant of authority but a limitation upon the powers of government, the legislature exercises inherent, not delegated, authority.

**Taxation—Exemptions—Power of Legislature.**

3. Under section 2, Article XII, of the state Constitution, the legislature may extend (and has extended) exemption from taxation to property of a *quasi*-public character, i. e., property used exclusively for agricultural and horticultural societies, educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, but cannot extend it to any other.

**Same—Property Liable to Taxation.**

4. Since section 2499, Revised Codes, exempts all property from taxation which, under section 2, Article XII, of the Constitution, may properly be exempted, all other property within the state not thus exempted is liable to taxation.

**Same—Exemptions—Rule.**

5. Taxation is the rule and exemption from it the exception.

[As to liability of state or municipal bonds to taxation by the state, see note in *Ann. Cas.* 1914B, 1163.]

**Same—Exemptions—State and County Bonds—Burden of Proof.**

6. In an action to recover taxes on state and county bonds paid under protest as improperly assessed, the plaintiff had the burden of showing that the state cannot tax its public securities when held in private ownership within the state, or that such bonds are not "property" within the meaning of that term as employed in Article XII of the Constitution and the revenue laws of the state, or that the bonds are exempt from taxation.

**Same—Power of State.**

7. Unless restrained by the Constitution of the United States, the state has the power to tax all subjects over which its sovereignty extends.

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On the question of liability of municipal bonds to taxation, see note in 12 L. R. A. (n. s.) 1159.

**Same—Public Securities—Power of State to Tax.**

8. The authority to tax its public securities is inherent in the state, and so long as the method of enforcing the tax does not impair the obligation of the contract between the state and its bondholders and thus runs counter to the United States Constitution, it may exercise its authority in that respect.

**Same—Public Securities—Taxability.**

9. State and county bonds held in private ownership within the state are "property," within the meaning of that term as employed in the Constitution and revenue laws of the state, and, not being declared exempt, are taxable as such.

**Constitution—Statutes—Construction—Rule.**

10. Whenever the language of a statute, or of a provision of the Constitution, is plain, simple, direct and unambiguous, it does not require construction—it construes itself.

**Taxation—Exemptions—Presumptions.**

11. The taxing power of the state is never presumed to be relinquished; but the intention to relinquish must be expressed in clear and unambiguous terms.

**Same—Exemptions—When to be Denied.**

12. Every claim for exemption from taxation should be denied unless the exemption is granted so clearly as to leave no room for any fair doubt.

**Same—State and County Bonds—Subject to Taxation.**

13. State or county bonds are the evidences of debts due to the holder thereof, and when held in private ownership are no longer the property of the state or county, and hence are not exempt from taxation.

**Same—Implied Exemption.**

14. The doctrine that notwithstanding the plain letter of the law to the contrary there is a presumption, based on public policy, in favor of the exemption of public securities from taxation, does not prevail in Montana.

**Public Policy—How Determined.**

15. The public policy of this state is determined by the enactments of the legislature, and, in their absence, by the decisions of the courts.

**Taxation—Purpose of Legislation.**

16. The purpose of tax legislation is to raise the necessary revenue for the support of government and the consequent security of the people in the possession of their property.

**Same—Exemptions—Burden of Proof.**

17. An exemption from taxation is a release from the obligation to support the government which affords protection to the taxpayer, and he who seeks immunity has the burden of showing that the property claimed to be exempt belongs to a class which is specifically exempt.

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

ACTION by Richard Cruse and others, administrators with the will annexed of the estate of Thomas Cruse, deceased, against

E. Fischl, Treasurer of Lewis and Clark County. Judgment for defendant and plaintiffs appeal. Affirmed.

*Messrs. Walsh, Nolan & Scallon*, for Appellants, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

At first blush, under section 2, Article XII, of the Constitution, section 2498, Revised Codes, and section 2499 as amended by Chapter 97 of the Laws of 1911, it would seem that the securities in question are not expressly within the exemption specified. However, having in mind the evils which might result from the taxation of state securities, a reasonable construction of the Constitution would authorize their inclusion. The taxation of state bonds, necessarily, affects their marketability. Indeed, the fact is that if these securities are taxed, the credit of the state will suffer impairment, as, with the interest rates which are provided for in the case of state bonds, it will be rather a difficult matter to dispose of them at par, or else a rate of interest will have to be provided for, which will permit the purchaser to make some profit on the money invested, at the same time paying the tax which will attach. In either case, the state's credit will be injuriously affected. It will be a case where the securities will have to sell below par or else it will be a case where a suspiciously high rate of interest will have to be provided for. (37 Cyc. 883.) In 12 Am. & Eng. Ency. of Law, 373, we find the following: "In Georgia and Louisiana it is considered that, even in the absence of any express exemption, state and municipal bonds are not rendered taxable by general words in reference to taxation, such as that 'all property shall be taxed.' " And the cases referred to in the note sustain the doctrine of the text.

The issuance of municipal securities is an essential of sovereignty. The doctrine is familiar that to tax is to destroy, and in the case of those securities, it would be beyond the power of the federal government to collect a tax on them. (*McCulloch v. Maryland*, 4 Wheat. (U. S.) 316, 4 L. Ed. 579.)

We grant that it is within the power of the state to provide for the taxation of its instrumentalities. Our contention is, however, that the general language which we encounter in the Constitution or in the laws of the states does not, necessarily, do this, and public policy forbids that it should be done. We realize that public policy is what the people declare in their fundamental law or by legislative enactment. But, unless there is a plain evident purpose that these agencies, without which the Government could not be carried on, should be taxed, there is every reason why they should not be taxed. (See 12 Am. & Eng. Ency. of Law, p. 367.)

We cite as supporting our contention that notwithstanding the language of the Constitution and statutes, to which reference has been made, public policy requires that public securities should be exempt from taxation, and that in most of the jurisdictions where by legislative enactment they are not expressly declared exempt, the courts have held them so: *Penick v. Foster*, 129 Ga. 217, 12 Ann. Cas. 346, 12 L. R. A. (n. s.) 1159, 58 S. E. 773, where cases bearing on the question under consideration are collected.

*Mr. J. B. Poindexter*, Attorney General, and *Mr. J. H. Alvord*, Assistant Attorney General, submitted a brief, in behalf of Respondent; *Mr. Frank W. Woody*, Assistant Attorney General, argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On the first Monday of March, 1915, the estate of Thomas Cruse, deceased, owned Montana state bonds, and bonds of Fergus county, Valley county, Yellowstone county and Carbon county, all of the aggregate value of \$207,500. These bonds were assessed at their par value, the tax thereon was paid under protest, and this action was instituted to recover the amount paid. The plaintiffs appealed from an adverse judgment, and

submit for determination the question: Are state and county bonds held in private ownership subject to taxation?

In theory, the burden of taxation ought to be borne by everyone in proportion to the value of his property. In practice it is not always so. Prior to the adoption of our state Constitution, there were few restraints upon the legislature with respect to its power to declare what property should and what should not be taxed, with the result that from time to time certain classes of privately owned property were declared exempt. At the time the constitutional convention assembled the list of exempt property was a formidable one. It will be found in section 1668, Fifth Division, Compiled Statutes of 1887. The abuse of power was manifest and the inequality in taxation plainly apparent. To obviate the difficulties confronting the new state, to provide the necessary revenue for public purposes, and to insure equal and exact justice in the matter of taxation so far as it was then deemed possible, the people withdrew from the lawmakers some of the legislative powers theretofore exercised, and in no uncertain terms prescribed limitations upon the authority to relieve property from its just proportion of the burdens of government.

The subject "Revenue and Taxation" is covered by Article [1] XII, of the Constitution. By section 2 of that Article two classes of property, and only two, were deemed proper subjects of relief from taxation. The first comprises public property—that is, the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries—and with respect to this property the Constitution declares that it shall be exempt. The second class comprises property of a *quasi*-public character—that is, property used exclusively for agricultural and horticultural societies, educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity. The legislature is permitted, but not required, to relieve any or all of the property



of this class from taxation, and it has all been declared to be exempt. (Sec. 2499, Rev. Codes.)

There cannot be a difference of opinion concerning the meaning of the language employed in section 2 above. The authority to tax any property of the first class is denied the lawmakers absolutely. The provision is mandatory in character, is self-executing and the legislation thereafter enacted declaring property of that class exempt added nothing to its force or effectiveness.

When we recall that our Constitution is not a grant of authority, [2, 3] but a limitation upon the powers of government—that our legislature exercises inherent and not delegated authority—the reference to the second class becomes equally explicit. While the language is permissive in form, it is prohibitory in effect. The legislature may extend the exemption to the property enumerated, but it cannot go further or include any other. This is the construction uniformly placed upon such provisions, and is commanded by the rule of interpretation contained in the Constitution itself. (Sec. 29, Art. III.)

Section 2 thus expresses the entire will of the people with [4] respect to the property absolutely exempt and the extent of legislative power to create exemptions. Section 2499, Revised Codes, is therefore to be construed strictly; that is to say, nothing is to be implied, for the legislation is as broad in its terms as the limitation permits, and in its enactment the lawmakers exhausted their power to relieve property from taxation. All other property within the state is liable to taxation. (Sec. 2498, Rev. Codes.)

As early as 1877 this court declared that taxation is the rule [5] and exemption the exception (*Hope Min. Co. v. Kennon*, 3 Mont. 35), and the principle is given added emphasis by the provisions of the Constitution and statutes above (*Northern Pac. Ry. Co. v. Mjelde*, 48 Mont. 287, 137 Pac. 386).

In order to escape the tax which has been levied upon these [6] bonds, appellants must assume the burden of showing (1) that the state cannot tax its public securities when held in

private ownership within the state, or (2) that such bonds are not property within the meaning of that term as employed in Article XII of the Constitution and the revenue laws of the state, or (3) that these bonds belong to one or the other of the two classes of property exempt from taxation.

(1) No court has ever ventured to assert that the state cannot tax such public securities. The power of taxation rests in necessity, is inherent in, and is one of the highest attributes of [7] sovereignty, vital to the very existence of government, and unless restrained by the Constitution of the United States, the authority of the state to subject to taxation all subjects over which the sovereignty extends cannot be questioned. (*Railroad Co. v. Pennsylvania*, 15 Wall. 300, 21 L. Ed. 179.) In *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579, the supreme court of the United States, speaking through Chief Justice Marshall said: "If we measure the power of taxation residing in a state by the extent of sovereignty which the people of a single state possess, and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a state unimpaired; which leaves to a state the command of all its resources."

In *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760, it is said: "Is, then, property, which consists in the promise of a state, or of a municipality of a state, beyond the reach of taxation? We do not affirm that it is. A state may undoubtedly tax any of its creditors within its jurisdiction for the debt due to him, and regulate the amount of the tax by the rate of interest the debt bears, if its promise be left unchanged. A tax thus laid impairs no obligation assumed. It leaves the contract untouched."

There is not any provision in the Constitution of the United States which inhibits a state from taxing its public securities [8] held in private ownership within the state, so long as the statutory method of enforcing the tax does not impair the obligation of the contract between the state and its bondholders.

Our conclusion is that the authority to tax these bonds is inherent in the state.

(2) Has the state assumed to exercise its taxing authority with respect to public securities? The answer must be that it [9] has, if these bonds are property within the meaning of that term as it is employed in the Constitution and laws.

Are the bonds property? At the time our Constitution was written it had been judicially determined in two states of the Union that the term "property," employed in their Constitutions and tax laws, did not comprehend municipal bonds or like public securities held in private ownership, and that such securities were not subject to taxation. In other states the contrary conclusion had been reached, and state bonds had been held to be liable to taxation; while in still other states public securities had been declared to be exempt from taxation by express constitutional or legislative mandate. With this history available to the members of our constitutional convention, and doubtless in their contemplation, they nevertheless included in section 17, Article XII, this significant provision: "The word 'property,' as used in this Article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership." We imagine that it would defy the ingenuity of the most profound lexicographer to formulate a more comprehensive definition, and, as if to make assurance doubly sure, the legislature adopted the same definition. (Sec. 2501, Rev. Codes.)

We are not confronted, as were the courts of Louisiana and Georgia, by a contemporaneous construction of the language of our Constitution contrary to the fair import of the language itself. The definition of "property" in section 17 above seems to leave no room for the application of the canons of construction. It is a rule which has been in force in this jurisdiction [10] for more than thirty-five years, that, whenever the language of a statute is plain, simple, direct and unambiguous, it does not require construction, but it construes itself. In other words, it is immaterial what may have been the legislative

thought, if no ambiguity exists in what the lawmakers said, and the language of the statute plainly expresses an intent, the letter of the law will not be disregarded under the pretext of pursuing its spirit. (*King v. National M. & E. Co.*, 4 Mont. 1, 1 Pac. 727; *Osterholm v. Boston & Mont. Co.*, 40 Mont. 508, 107 Pac. 499.) The same rule is applied in the interpretation of a provision of the Constitution. (*Dunn v. Great Falls*, 13 Mont. 58, 31 Pac. 1017.) The bald declaration of our Constitution that the term "property" includes bonds should suffice; but the co-ordination of the word "bonds" with moneys, credits and stocks indicates a determination to subject to taxation every species of bonds held in private ownership within this state possessing any monetary value.

It may be true—and doubtless is true—that by imposing a tax upon its public securities this state places itself at a disadvantage when it goes upon the money market to sell its bonds in competition with other states whose public securities are exempt; but, so long as the power to tax resides in the state, no one can deny its right to exercise the power. These bonds would doubtless sell to better advantage if freed from the burden of taxation; but the same thing is equally true of the public lands owned by the state, and no one would suggest that these lands, when sold to private parties, are not "property" within the meaning of that term as used in the Constitution and statutes. (*Courtney v. Missoula County*, 21 Mont. 591, 55 Pac. 359.)

In Georgia it is held that such general expressions as "taxable property" or "all property" do not include state, county or municipal bonds. (*Augusta v. Dunbar*, 50 Ga. 387; *Müller v. Wilson*, 60 Ga. 505; *Macon v. Jones*, 67 Ga. 489; *Penick v. Foster*, 129 Ga. 217, 12 Ann. Cas. 346, 12 L. R. A. (n. s.) 1159, 58 S. E. 773.) The same conclusion was reached by a divided court in Louisiana. (*Da Ponte v. Board of Assessors*, 35 La. Ann. 651.) The soundness of this conclusion was thereafter questioned, but the decision was followed upon the ground that it had become a rule of property. (*State ex rel. Improvement Co. v. Board of Assessors*, 111 La. Ann. 982, 36 South. 91, opin-

ion on rehearing.) By the overwhelming weight of authority, public securities fall within the meaning of the term "property," and, when privately owned, are subject to taxation unless specifically exempt. (*Hall v. Middlesex County*, 10 Allen (Mass.), 100; *Bank v. Smith*, 7 Ohio St. 42; *People v. Insurance Co.*, 29 Cal. 534; *Commonwealth v. Maury*, 82 Va. 883, 1 S. E. 185; *People v. Commissioners of Taxes*, 76 N. Y. 64, 77; *Bank v. Wilkes-Barre*, 148 Pa. 601, 24 Atl. 111; *Bank v. Russellville*, 133 Ky. 637, 134 Am. St. Rep. 479, 19 Ann. Cas. 410, 118 S. W. 921; *Jenkins v. Charleston*, 5 S. C. 393, 22 Am. Rep. 14, reversed on other grounds, 96 U. S. 449, 24 L. Ed. 760; *Baltimore v. State*, 105 Md. 1, 65 Atl. 369; *State v. Woodruff*, 37 N. J. L. 139; *Bank v. Memphis*, 116 Tenn. 641, 94 S. W. 606.)

No reason is advanced sufficiently cogent to require that the constitutional definition of "property" should be so restricted as to exclude public securities privately owned, and we hold that these bonds are property and subject to taxation unless they are exempt.

(3) Do these bonds belong to either class of property exempt from taxation?

The taxing power of the state is never presumed to be relinquished unless the intention to relinquish is expressed in clear and unambiguous terms. (*Philadelphia etc. R. R. Co. v. Maryland*, 10 How. 376, 13 L. Ed. 461; Cooley on Taxation, p. 146.)

Every claim for exemption from taxation should be denied unless the exemption is granted so clearly as to leave no room for any fair doubt. (4 Dillon on Municipal Corporations, 5th ed., sec. 1401.)

It is not contended—and could not be—that these bonds fall within the second class, and they do not fall within the first class, unless it can be said in some sense that they are the property of the state or of the respective counties. These bonds are the evidence of debts due from the state or county, as the case may be, to the holder of the bonds. The public is the debtor and the holder of the securities is the creditor. Can it

be said in any sense that the state bonds owned by the Cruse estate are property of the state of Montana, or that the county bonds are property of the respective counties? We content ourselves by answering in the language of the supreme court of the United States: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. \* \* \* This principle might be stated in many different ways, and supported by citations from numerous adjudications; but no number of authorities, and no forms of expression, could add anything to its obvious truth, which is recognized upon its simple statement." (*Railroad Co. v. Pennsylvania*, above.)

Our conclusion is that these bonds do not fall within either class of property specifically exempt from taxation.

We are not unmindful of the fact that authorities may be [14] found which hold that, notwithstanding the plain letter of the law, there is a presumption in favor of the exemption of public securities from taxation based upon the theory that public policy requires it; but, in view of the history of our tax legislation before and since the adoption of the Constitution, that doctrine cannot prevail in this jurisdiction. We determine the [15] public policy of this state by reference to the enactments of the lawmaking power, and, in the absence of them, to the decisions of the courts (*Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631), and these authorities are consistently opposed to the theory of implied exemption. No valid reason is suggested why it should prevail here. The owner of state, county or municipal bonds receives the same protection as the owner of real estate, livestock, money or commercial paper. One man invests his capital in state bonds as a source of income and profit. Another, impelled by the same motive, invests in the bonds of a private corporation. Both investments are taxed as property, and the consequence

is that the rate of profit is diminished in each instance. This [16] is the effect, but it is not the object, of tax legislation. Its purpose is, not interference with the rights of borrowers or lenders, but to raise the necessary revenue for the support of the government and the consequent security of the people in the possession of their property.

Our Bill of Rights guarantees to everyone the protection of his property, but this protection carries with it the corresponding obligation to support the government which affords [17] the protection. An exemption from taxation is a release from this obligation, and anyone who seeks the immunity must show that his property belongs to a class which is specifically exempt. (*Kalispell v. School District No. 5*, 45 Mont. 221, 122 Pac. 742.)

It may be that in certain sections of this state the total tax exacted equals or exceeds the entire income from public securities; but courts can neither make nor unmake laws, much less hold for naught the express declarations of the Constitution. As has been pertinently remarked: "There is nothing very poetic about tax laws. Wherever they find property, except what is devoted to public and charitable uses, they claim a contribution for its protection, without any special respect to the owner or his occupation, and without reflecting much on questions of generosity or courtesy." (*Finley v. Philadelphia*, 32 Pa. St. 381.)

These bonds are liable to taxation. The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY CONCURS.

AINSWORTH, RESPONDENT, v. MCKAY, COUNTY CLERK AND  
RECORDER, APPELLANT.

(No. 4,306.)

(Submitted November 2, 1918. Decided November 4, 1918.)

[175 Pac. 887.]

*Counties—Removal of County Seat—Petition—Sufficiency—  
Test—Board of County Commissioners—Powers.*

Removal of County Seat—Petition—Sufficiency—Test.

1. *Held*, under section 2852, Revised Codes, that the board of county commissioners is limited in its investigation of the sufficiency of a petition for the removal of the county seat to a comparison of the names appearing thereon with the poll-books to ascertain whether the signers are voters, and with the assessment-roll, whether they are taxpayers, and may not, therefore, eliminate from the petition names of persons who have ceased to be legal voters or taxpayers.

Board of County Commissioners—Powers.

2. The board of county commissioners possesses only such authority as is conferred upon it expressly, and such additional authority as is necessarily implied from that which is granted expressly.

[As to liability of county boards to private individuals, see note in 95 Am. St. Rep. 80.]

*Appeal from District Court, Sanders County, in the Fourth Judicial District; A. P. Stark, Judge of the Sixth District, presiding.*

ACTION by A. S. Ainsworth against John F. McKay, as County Clerk and Recorder in and for the County of Sanders, State of Montana, and others. Judgment for plaintiff, and defendants appeal. Affirmed.

*Mr. H. C. Smith* and *Mr. J. M. Self*, for Appellants, submitted a brief; *Mr. Smith* argued the cause orally.

*Mr. H. H. Parsons*, for Respondent, argued the cause orally.

Opinion—PER CURIAM.

The one question presented is whether the petition for the removal of the county seat of Sanders county is sufficient to

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Authorities discussing the question on what basis majority essential to adoption of proposition for change of county seat is to be computed, see note in 22 L. E. A. (n. s.) 478.



authorize the commissioners to submit to the electors the question of removal. The cause was tried to the lower court upon an agreed statement of facts, the material portion of which is that the commissioners disregarded the names, on the poll-books and assessment-roll, of all persons who, since those records were made up, had ceased to be legal voters in the one instance, or *ad valorem* taxpayers in the other, and, with these eliminations made, held the petition to be sufficient. It is agreed that, if the commissioners were authorized to make such eliminations, their conclusion is correct, but, if they were not so authorized, then the petition is insufficient. The trial resulted in a judgment for plaintiff, and defendants appealed.

Section 2851, Revised Codes, provides for a petition as the [1] means by which proceedings for the removal of a county seat are initiated. Section 2852 provides: "If the petition is signed by a majority of the taxpayers of such county, the board must at the next general election submit the question of removal to the electors of the county; Provided that the term 'taxpayers' used in this section shall be deemed to mean '*ad valorem* taxpayers,' and that for the purpose of testing the sufficiency of any petition which may be presented to the county commissioners, as provided in this section, the county commissioners shall compare such petition with the poll-books in the county clerk's office constituting the returns of the last election held in their county, for the purpose of ascertaining whether such petition bears the names of a majority of the voters listed therein; and they shall make a similar comparison of the names signed to the petition with those appearing upon the listed assessment-roll of the county for the purpose of ascertaining whether the petition bears the names of a majority of the *ad valorem* taxpayers as listed in said assessment-roll; and if such petition then shows that it has not been signed by a majority of the legal voters of the county who are *ad valorem* taxpayers thereof, it shall be deemed insufficient, and the question of removal of the county seat shall not be submitted."

If the terms "legal voters of the county who are *ad valorem* taxpayers thereof," as used in the concluding sentence above are to be given their literal meaning, then the commissioners would be required to eliminate from their consideration of the poll-books the names of all persons who had died, removed, or for any other reason had lost the right to vote, and they would be required to add to the number remaining all new voters who had acquired the right; for it has been determined repeatedly that registration is not a qualification to vote, but a mere safeguard of the purity of the ballot. (*State ex rel. Lang v. Furnish*, 48 Mont. 28, 134 Pac. 297; *State ex rel. Fadness v. Eie*, 53 Mont. 138, 162 Pac. 164.) The same rule would apply in the use of the assessment-roll; but that it was not the purpose to use the terms "voters" and "taxpayers" in this broad sense is apparent, and is conceded by both parties, we understand.

What function do the poll-books and assessment-roll perform in the determination of the sufficiency of a petition for county seat removal? The question is answered by section 2852 itself. For the purpose of testing the sufficiency of the petition, the commissioners shall compare the petition with the poll-books constituting the returns of the last election held in the county, for the purpose of determining whether the petition bears the names of a majority of the voters listed therein, and they shall likewise compare the petition with the assessment-roll, to ascertain whether the petition bears the names of a majority of the *ad valorem* taxpayers listed on that roll. The language is significant. The sufficiency of the petition is to be *tested* by comparing it with the poll-books and assessment-roll. "Testing" means the act of proving. Test: To put to proof; to prove the truth, genuineness, or quality of, by experiment or by some principle or standard. (Webster's International Dictionary.) "Test" as a noun means: An examination made for the purpose of proving or disproving some matter in doubt; a criterion or standard of judgment. As a verb it means: To subject to conditions that disclose the true character of a thing. (Standard Dictionary.)

The legislature, therefore, made of the poll-books and assessment-roll a standard or measure by which the sufficiency of the petition is to be determined. The petition is merely a preliminary means by which the election machinery is set in motion. The determination of its sufficiency or insufficiency adjudicates no private rights; establishes no precedent; settles no principles. (*State ex rel. Lang v. Furnish*, above.)

In the absence of constitutional restrictions the legislature was free to prescribe any test it might choose (*State ex rel. Eagye v. Bawden*, 51 Mont. 357, 152 Pac. 761), and it chose to select the poll-books as the standard by which the board should determine the number of voters, and the assessment-roll as the criterion by which the number of *ad valorem* taxpayers should be ascertained. In other words, for the purpose of this preliminary step only, the statute designates as a voter one whose name is on the poll-books, and an *ad valorem* taxpayer one whose name is on the assessment-roll, and who is assessed for property.

As if to leave no doubt that the poll-books and assessment-roll constitute the sole criterion for testing the sufficiency of the petition, the statute, after directing that the petition shall be compared with each, provides that, if then [after the comparison is made] the petition shows that it has not been signed by a majority of the legal voters who are *ad valorem* taxpayers, it shall be insufficient, and the question of removal shall not be submitted. The evident purpose of section 2852 is to provide a simple and certain method by which the board shall determine the sufficiency of the petition—a method freed from all the uncertainties of an investigation founded upon human testimony. A reference to these public records, made and kept under the sanction of official oath, was deemed sufficient for the purposes of this preliminary proceeding.

The board of county commissioners is a specially constituted [2] tribunal, possessing only such authority as is conferred upon it expressly, and such additional authority as is necessarily implied from that which is granted expressly. (*State ex rel. Lambert v. Coad*, 23 Mont. 131, 57 Pac. 1092; *State ex*

*rel. Gillett v. Cronin*, 41 Mont. 293, 109 Pac. 144.) The authority to go beyond the poll-books and assessment-roll to ascertain whether the petition is signed by a sufficient number of persons is not granted in express terms; neither can it be implied from the power which is granted. On the contrary, the language of section 2852 indicates a purpose to confine the board to the particular sources of information mentioned, as they appear in the public records of the county.

No question is raised as to the right of the commissioners to determine the genuineness of the signatures to the petition, or the identity of the persons whose names appear thereon, with the persons whose names appear on the poll-books or on the assessment-roll.

Section 2041, Revised Codes (the local option statute), provides: "The county commissioners must determine on the sufficiency of the petition presented, by the last assessment-roll of the county." This was held to constitute the assessment-roll the exclusive standard by which to determine whether the petition was signed by the requisite number of taxpayers. Concerning it this court said: "The board is not authorized to consult any other sources of information or to receive evidence which does not appear upon the roll." (*State ex rel. Eagye v. Bawden*, above, affirmed in *State ex rel. Fadness v. Eie*, above.)

The language employed by this court in *State ex rel. Stringfellow v. Board*, 42 Mont. 62, 78, 111 Pac. 144, 149, is to be understood in view of the record made in that case. It was there said: "The essential requisite of a petition for the removal of a county seat is that it shall be signed by a majority of the legal voters of the county who are *ad valorem* taxpayers thereof." With the limitation placed upon the definition of "voters" and "taxpayers" above, we reaffirm this statement as a correct exposition of the law.

The New Counties Act (Laws 1913, Chap. 133) considered in *State ex rel. Lang v. Furnish*, above, differs so materially from section 2852 that the construction placed upon the former cannot apply to the latter.

Our conclusion is that the commissioners were not authorized to make the eliminations which were made, and under the agreed statement of facts it follows that the petition in question is insufficient, and that the judgment of the district court should be, and it is, affirmed.

*Affirmed.*

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LEARY, APPELLANT, v. YOUNG ET AL., RESPONDENTS.

(No. 4,297.)

(Submitted November 4, 1918. Decided November 7, 1918.)

[176 Pac. 36.]

*Special Elections—County High School Bonds—Notice—Failure to Publish—Effect.*

1. Where the electors of a county had actual notice of a special election to be held for raising funds by a bond issue for high school purposes, failure of the county clerk to publish the statutory notice (Rev. Codes, sec. 531), did not invalidate the election.

*Appeal from District Court, Lincoln County; T. A. Thompson, Judge.*

SUIT by J. E. Leary against C. T. Young and others, as County Commissioners, and L. G. Kienck, as Clerk of Lincoln County. Plaintiff appeals from a judgment for defendants and an order denying a new trial. Affirmed.

Cause submitted on briefs of Counsel.

*Messrs. Rowland & Gray*, for Appellant.

*Mr. S. C. Ford*, Attorney General, *Mr. R. L. Mitchell*, Assistant Attorney General, and *Mr. B. F. Maiden*, for Respondents.

Opinion—PER CURIAM.

At a special election held on June 24, 1918, in Lincoln county, a majority of the electors voting authorized the board of county

commissioners to issue bonds to the amount of \$48,000 to provide funds to erect and equip a county high school building. On October 9 the plaintiff, a resident taxpayer of the county, brought this action to enjoin the issuance and sale of the bonds. After the issues were made up by formal pleadings, a trial was had upon an agreed statement of facts, which resulted in a judgment denying the injunction and awarding costs to the defendants. The plaintiff has appealed from the judgment and an order deying him a new trial.

The question presented for determination is whether the failure of the clerk to publish the notice required by section 531 of the Revised Codes invalidated the election notwithstanding the electors had actual notice of its date and of the question submitted to them. This question has heretofore been twice considered and determined by this court adversely to the contentions made by appellant's counsel. (*State ex rel. Patterson v. Lentz*, 50 Mont. 322, 146 Pac. 932; *Wright v. Flynn*, 55 Mont. 61, 173 Pac. 421.) We are entirely satisfied with the conclusions reached in these cases, and upon their authority the judgment and order are affirmed.

*Affirmed.*

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J. I. CASE THRESHING MACHINE CO., RESPONDENT, v.  
HAMILTON ET AL., APPELLANTS.

(No. 3,942.)

(Submitted September 18, 1918. Decided November 12, 1918.)

[176 Pac. 152.]

*Promissory Notes—Commissions—Burden of Proof—Presumptions—New Trial—Discretion.*

*Commissions—Payment—Burden of Proof.*

1. Where commissions on sales of machinery were claimed under a dealer's contract which provided that commissions were not to become due and payable until the purchase price should have been paid, the burden was upon the party claiming them to show payment.

[As to right of agent for sale of goods to commission where purchaser rejects goods or fails to pay, see note in *Ann. Cas.* 1915B, 169.]

**Promissory Notes—Presumptions.**

2. Where defendant gave his promissory notes to plaintiff at a time when, as alleged in his counterclaim, the latter was indebted to him in a substantial sum, defendant had the burden of rebutting the presumption that they would not have been executed if plaintiff had been indebted to him.

**New Trial—Discretion.**

3. *Held*, that the trial court was not guilty of abuse of discretion in granting a new trial for insufficiency of the evidence to justify a verdict.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by the J. I. Case Threshing Machine Company against R. E. Hamilton and another. From an order granting plaintiff's motion for new trial, defendants appeal. Affirmed.

*Mr. Chas. J. Marshall* and *Mr. E. K. Cheadle*, for Appellants, submitted a brief; *Mr. Cheadle* argued the cause orally.

*Mr. B. P. Berger* and *Mr. C. W. Buntin*, for Respondent, submitted a brief; *Mr. Buntin* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

Plaintiff brought this action to recover a balance of \$1,290.45 alleged to be due on two promissory notes executed by defendants on July 19, 1913, with interest at the rate of ten per cent per annum from November 11, 1914, the date of the last payment, together with a reasonable attorney's fee to be allowed as costs. The defenses interposed were a general denial of all the material allegations of the complaint, and three several counterclaims amounting in the aggregate to \$1,089.07, upon which defendants claimed interest at the rate of eight per cent per annum from the respective dates at which it is alleged the several amounts became due. A trial to a jury of the issues framed by the complaint, amended answer and plaintiff's reply resulted in a judgment for plaintiff for \$567.22, with costs, including an attorney's fee, taxed at \$371. Thereafter the plaintiff moved

for a new trial, alleging all the statutory grounds. From a general order granting the motion, defendants have appealed.

Counsel for defendants, assuming that the trial court granted the order on the ground that the evidence was insufficient to justify the verdict, have devoted their entire argument to an attempt to show that it was guilty of an abuse of discretion. After a careful reading of the somewhat voluminous evidence, we conclude that the argument is without merit. There was no substantial controversy that defendants were indebted to plaintiff in the full amount of the balance due on the two notes, less the items, with interest, which defendants could show they were entitled to recover under their counterclaims. Neither was there any controversy that defendants were entitled to recover the amount of their third counterclaim, with interest from July 19, 1913, the date at which it became due. This amount was \$17.10. Therefore the questions at issue in the evidence to be resolved by the jury were, what amounts, if any, defendants were entitled to recover under the first and second counterclaims. The two principal items—\$200 each—composing the first counterclaim, without allowance of one or both of which [1] the jury could not have found a verdict in the amount they did, were claims for commissions earned on two sales of machinery by defendant R. E. Hamilton under a dealer's contract with the plaintiff; a half interest therein having been assigned by him to his codefendant. A copy of the contract introduced in evidence disclosed that under its terms the earned commissions were not to become due and payable until the purchasers of machinery should have paid the purchase price, and that the price under neither sale had been paid except a part of the second; the amount of this, however, not being shown. The burden was upon defendants, not only to show payment by the purchasers, but also the amount of each payment, before they were entitled to recover any part of these items. There is no evidence in the record on this subject.

Other small items of commissions on sales of extras and supply parts of machinery sold, amounting to \$36.50, fall in



the same class as the two principal items. There is no evidence showing that the extras and supply parts had been paid for.

Several other small items aggregating \$18.10, for expenses incurred in connection with machinery sold, apparently fall within the provisions of the dealer's contract, and were not a proper charge against the plaintiff.

The defendant R. E. Hamilton executed the dealer's agreement on August 27, 1912. The two remaining items are a charge for services alleged to have been performed for plaintiff by Hamilton at different times from July 1 to November 10, 1912, amounting to \$348, and a charge for expenses for engineer's services paid for by Hamilton at different times from August 23 to September 23, 1912, amounting to \$105. Under the terms of the dealer's agreement, Hamilton was not entitled to charge plaintiff for any services in setting up and adjusting machinery or fitting attachments, *etc.* Therefore, for the services rendered by Hamilton after August 27, he was apparently not entitled to make any charge. In any event, the burden was upon him to show that such services were rendered under a special agreement and not under the dealer's agreement. Besides, the evidence was in conflict as to the extent and value of the services. These remarks apply also to the expenses incurred for [2] engineer's services. Furthermore, all these services were performed and expenses incurred during the year 1912. The notes upon which the plaintiff seeks recovery were executed nearly a year afterward. The presumption obtains that defendants would not have executed these notes while the plaintiff was indebted to R. E. Hamilton in such a substantial sum as is represented by the items included in this counterclaim. This presumption is a rebuttable one, but it cast the burden upon the defendants, and we do not find any evidence in the record which tends in any measure to rebut it.

The second counterclaim alleged as a ground for recovery that during the year 1912 the plaintiff had accepted from Hamilton orders for money drawn by him on persons for whom he had threshed grain during the threshing season for that year, to the

amount of \$162.32, under an agreement that plaintiff would credit them upon an account due from Hamilton to plaintiff, but that plaintiff had failed and refused to give him credit. It was alleged that he had assigned a half interest in these claims to his codefendant. The evidence discloses that these orders had been accepted merely as collateral security with the right to collect them, but that no credit was to be given for them until they should be collected. It is disclosed further that only \$43.62 of the amount had been collected, for which credit had been given. It thus conclusively appears that defendants were not entitled to recover anything on this counterclaim.

This brief synopsis is sufficient to show that the court was not [3] guilty of abuse of discretion in granting the motion, but that plaintiff was entitled to a new trial as a matter of right.

The order is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY concurs.

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MATTI, APPELLANT, *v.* CHICAGO, MILWAUKEE & ST. PAUL RY. CO., RESPONDENT.

(No. 3,943.)

(Submitted September 19, 1918. Decided November 12, 1918.)

[176 Pac. 154.]

*Personal Injuries—Master and Servant—Railroads—Federal Employers' Liability Act—Interstate Commerce—Burden of Proof—Res Ipsa Loquitur.*

*Personal Injuries—Res Ipsa Loquitur—Inapplicability of Doctrine.*

1. The doctrine of *res ipsa loquitur* held inapplicable in an action by a laborer injured by the fall of a brick upon his foot while engaged in moving a wheelbarrow load of bricks from a freight-car to a building in course of construction.

[As to accident, as evidence of negligence, see notes in 6 Am. St. Rep. 792; 20 Am. St. Rep. 490; 30 Am. St. Rep. 736; Ann. Cas. 1914D, 908.]

**Same—Federal Employers' Liability Act—Interstate Commerce—Burden of Proof.**

2. In order to make out a *prima facie* case, where recovery for a personal injury is sought under the federal Employers' Liability Act, plaintiff has the burden of proving that at the time of the accident he was employed in interstate commerce.

**Same—Federal Employers' Liability Act—Construction—Federal Question.**

3. The construction of the federal Employers' Liability Act involves a federal question, with respect to which the decisions of the United States supreme court are conclusive upon state courts.

**Same—Evidence—Insufficiency.**

4. *Held*, that a laborer employed in loading bricks from a railroad car into a wheelbarrow and moving them to a freight terminal being erected by defendant railway company for use in connection with a line of road in course of construction but not completed and not put to use until several months after the accident, was not engaged in interstate commerce and was therefore not entitled to recover under the federal Employers' Liability Act for an injury to his foot caused by bricks falling upon it.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by John Matti against the Chicago, Milwaukee & St. Paul Railway Company. Judgment of nonsuit. Plaintiff appeals from an order denying him a new trial. Affirmed.

*Mr. E. K. Cheadle*, for Appellant, submitted a brief and argued the cause orally.

*Mr. Chas. J. Marshall*, for Respondent, submitted a brief and argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1913, the Chicago, Milwaukee & St. Paul Railway Company owned and operated, as a part of its system, a branch line from Harlowtown to Lewistown and handled all its freight at the Lewistown terminal, at what is designated "the old warehouse." The company was then engaged in constructing a new line of road from Lewistown to Great Falls, and was likewise building a new warehouse in Lewistown, several blocks away from the old one. The new warehouse was completed and put

to use in January, 1914, and the new line was completed several months later. The company had moved a carload of bricks from [1] a brick manufacturing plant in Lewistown to a point on a spur-track near the new building, and plaintiff was employed to take the bricks from the car to the building. Another employee of the company worked inside the car, carrying the bricks and piling them in the car door for plaintiff to place in a wheelbarrow and remove to the building. While these men were thus engaged on October 11, 1913, some bricks fell upon plaintiff's foot, causing injury. He brought this action to recover damages and alleged that the company furnished the workman within the car with a brick-carrying device which was out of repair and dangerous; that the company knew, but plaintiff did not know, that the device was in a defective condition; and that the company, through its employee who was using the device, negligently permitted bricks to fall from it upon plaintiff, causing the injury.

To bring himself within the federal Employers' Liability Act and avoid the defense of fellow-servant's negligence plaintiff alleged that, at the time of the injury, the company was engaged in interstate commerce and that he was employed in such commerce. This last allegation was put in issue, and the company pleaded the defense of fellow-servant's negligence. Upon the trial, the court granted a motion for nonsuit, and plaintiff appealed from an order denying him a new trial.

There was not any evidence offered to sustain the allegation that the carrying device was out of repair, and if it be conceded, for the purpose of this appeal, that negligence was shown, it was the negligence of the fellow-servant. The circumstances do not admit of the application of the maxim, "*Res ipsa loquitur*."

In order to make out a *prima facie* case, it was incumbent [2] upon the plaintiff to prove that he was employed in interstate commerce at the time he was injured. The federal Employers' Liability Act (Act April 22, 1908, Chap. 149, sec. 1, 35 Stat. 65 with the amendment thereto (36 Stat. 291 [U. S. Comp. Stats. 1911, Supp., p. 1324]) provides: "That every common

carrier by railroad while engaging in commerce between any of the several states \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

Appellant relies upon the decision of the supreme court of Utah in *Grow v. Oregon S. L. Co.*, 44 Utah, 160, Ann. Cas. 1915B, 481, 138 Pac. 398; but in the later case of *Perez v. Union Pac. R. Co.*, 173 Pac. 236, the same court, after reviewing the later federal cases and adverting to the fact that the *Grow Case* was decided by a divided court, said: "Whether the majority opinion would stand to-day in the light of more recent opinions by the United States supreme court is at least a debatable question." The construction of the Act of Congress above involves a federal [3] question with respect to which the decisions of the supreme court of the United States are conclusive upon this court.

In *Pedersen v. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, Ann. Cas. 1914C, 153, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779, the court determined that an employee engaged in bringing materials for the repair of a bridge actually in use as a part of the company's line for the transportation of interstate commerce was engaged in such commerce, but emphasis was laid upon the fact that the bridge was actually in use in interstate commerce, and that work of keeping it in repair was so closely related to such commerce as to be, in practice and in legal contemplation, a part of it. The court said: "The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? (Citing cases.) Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such."

In *Illinois Cent. R. R. v. Behrens*, 233 U. S. 473, Ann. Cas. 1914C, 163, 58 L. Ed. 1051, 34 Sup. Ct. Rep. 646, 10 N. C. C. A. 153, it was held that a member of the switching crew engaged in moving cars loaded with intrastate freight, from one part of New

Orleans to another, was not engaged in interstate commerce, though the company handled interstate shipments and plaintiff at other times moved cars loaded with such freight. The court referred to the language of the Act above, and said: "It is clear that Congress intended to confine its action to injuries occurring when the particular service in which the employee is engaged is a part of interstate commerce."

In *Delaware, L. & W. R. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. Ed. 1397, 35 Sup. Ct. Rep. 902, it was held that an employee engaged in one of the company's collieries mining coal for use upon locomotives engaged in interstate commerce was not himself engaged in such commerce.

In *Shanks v. Delaware, L. & W. R. R. Co.*, 239 U. S. 556, L. R. A. 1916C, 797, 60 L. Ed. 436, 36 Sup. Ct. Rep. 188, it was held that a machinist who was injured while moving an overhead countershaft, through which power was communicated to machinery for repairing locomotives used in interstate commerce, was not himself engaged in such commerce. The court said: "Having in mind the nature and usual course of the business to which the Act relates and the evident purpose of Congress in adopting the Act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one better suited to the occasion (see *Swift & Co. v. United States*, 196 U. S. 375, 398 [49 L. Ed. 518, 25 Sup. Ct. Rep. 276]) and that the true test of employment in such commerce in the sense intended is: Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?"

In *Chicago, B. & Q. R. R. v. Harrington*, 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992, it was held that a member of a switching crew engaged in moving cars of coal from a storage track in Kansas City to coal-bins in another part of the city was not engaged in interstate commerce. It was held to be immaterial whether the coal was brought from points within or without the state of Missouri, and the test applied in the *Shanks Case* above was reiterated, and the court observed:

"Manifestly, there was no such close or direct relation to interstate transportation in the taking of the coal to the coal-chutes."

Notwithstanding the difference in the facts, the general principles announced above were deemed controlling in each of the following cases involving facts analogous to those presented in the present appeal:

In *Raymond v. Chicago, M. & St. P. Ry. Co.*, 243 U. S. 43, 61 L. Ed. 583, 37 Sup. Ct. Rep. 268, there were presented these facts: The Milwaukee main line had been completed from Chicago to Seattle, and had been employed for several years in interstate commerce. In order to shorten the line, lessen the grade, and make more efficient its service, the company commenced cutting a tunnel through the mountain between Horriek's Spur and Rockdale, Washington, with the intention of using the tunnel, when completed, for the main line. Raymond was employed as a laborer in the tunnel work and was injured while in the discharge of his duties and before the tunnel was completed or in use. The court said: "Considering the suit as based upon the federal Employers' Liability Act, it is certain under recent decisions of this court, whatever doubt may have existed in the minds of some at the time the judgment below was rendered, that under the facts as alleged Raymond and the railway company were not engaged in interstate commerce at the time the injuries were suffered, and consequently no cause of action was alleged under the Act"—citing the *Yurkonis* and *Harrington Cases* above.

At the same term, the court decided the case of *New York Cent. R. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D, 629, L. R. A. 1917D, 1, 61 L. Ed. 667, 37 Sup. Ct. Rep. 247. The railroad company, an interstate carrier, was engaged in building a new station and new tracks upon its line. White was employed by it as a watchman to guard tools and materials intended to be used in the new construction work, and while so engaged was killed. The action was brought by his surviving wife. The supreme court disposed of the case as follows: "The first point assumes that the deceased was employed in interstate commerce at the

time he received the fatal injuries. \* \* \* The admitted fact that the new station and tracks were designed for use, when finished, in interstate commerce, does not bring the case within the federal Act. The test is: 'Was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it?' (*Shanks v. Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 558 [L. R. A. 1916C, 797, 60 L. Ed. 436, 36 Sup. Ct. Rep. 188].) Decedent's work bore no direct relation to interstate transportation, and had to do solely with construction work, which is clearly distinguishable, as was pointed out in *Pedersen v. Delaware, Lackawanna & Western R. R. Co.*, 229 U. S. 146, 152 [Ann. Cas. 1914C, 153, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648, 3 N. C. C. A. 779]. And see *Chicago, Burlington & Quincy R. R. Co. v. Harrington*, 241 U. S. 177, 180 [60 L. Ed. 941, 36 Sup. Ct. Rep. 517, 11 N. C. C. A. 992]; *Raymond v. Chicago, Milwaukee & St. Paul Ry. Co.*, this day decided, *ante* [243 U. S.], p. 43, [61 L. Ed. 583, 37 Sup. Ct. Rep. 268]. The first point therefore is without basis in fact."

Three years prior to the decision in the last case above, a somewhat similar case was before the circuit court of appeals for the eighth circuit. (*Bravis v. Chicago, M. & St. P. Ry. Co.*, 217 Fed. 234, 133 C. C. A. 228.) The railway company, an interstate carrier, was engaged in straightening its main-line track between Hopkins, Minnesota, and Aberdeen, South Dakota, and to that end was building a cut-off near Chanhassen, Minnesota, to avoid a curve. The new roadbed was practically completed, but the rails were not laid. A concrete bridge was being installed as a part of the cut-off. Bravis was employed by the company to work on the bridge and, while so employed, was injured. The court held that he was not employed in interstate commerce, and said: "But there were no rails on the roadbed on this cut-off. It never had been used, it was not then used, and until it should be ironed it could not be used, by the defendant in interstate commerce. The mere fact that it was the purpose and intention so to use it at some future time did not make it



an instrumentality of interstate commerce. That purpose and intention might be changed, and it might never be used in interstate commerce, or, at all. The argument that the building of the cut-off was the mere correction or prevention of a defect or insufficiency of the defendant's instrumentality for conducting interstate commerce is too remote and inconsequential to convince."

The decisions in the foregoing cases determine that plaintiff [4] was not employed in interstate commerce at the time he was injured, and therefore he was not entitled to recover upon his own showing.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY CONCURS.

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BJORNEBY' ET AL., RESPONDENTS, v. MINNEAPOLIS  
THRESHING MACHINE CO., APPELLANT.

(No. 3,950.)

(Submitted September 20, 1918. Decided November 18, 1918.)

[176 Pac. 617.]

*Principal and Agent—Commissions—Agency Contracts—Modification—Effect—Account Stated.*

Principal and Agent—Commissions—Account Stated.

1. In an action to recover commissions on sales of farm implements under an agency contract, a "settlement sheet," the debit and credit sides of which apparently balanced and which was signed by plaintiffs, held, under the circumstances, not to constitute an account stated, i. e., an agreement that nothing was due them for services performed in making the sales.

[As to right of agent to file bill against principal for an accounting see note in Ann. Cas. 1914B, 836.]

Same—Agency Contract—Modification—Right to Commissions.

2. Sales for less than price list and on terms different from those authorized in the agency contract could not prevent recovery of commissions where the changes in price and terms were directed by defendant under a clause in the contract reserving to itself the right to do so.

**Same—Payment—Second-hand Articles—Commissions.**

3. Where sales agents were instructed by their principal to accept a second-hand engine as part payment on new farm implements, the value placed upon the engine by defendant company represented money, on which plaintiffs were entitled to commissions.

**Same—Right to Commissions—Unpaid Installments.**

4. Where an agency agreement provided that commissions on time sales should be due only when the installments were paid to the principal, they could not be recovered upon unpaid installments.

*Appeal from District Court, Flathead County; T. A. Thompson, Judge.*

ACTION by Emil B. Bjorneby and another, doing business under the firm name and style of Bjorneby Brothers, against the Minneapolis Threshing Machine Company. Judgment for plaintiffs. Defendant appeals. Modified and affirmed.

*Messrs. McKenzie & McKenzie*, for Appellant, submitted a brief; *Mr. John McKenzie* argued the cause orally.

Plaintiffs allege a settlement between the parties concerning the sale but object to a part of the settlement sheet, to-wit: The placing of the small "o." And with respect to the small "o" or the settlement sheet, they do not allege any false statements or representations made by appellant regarding the same, but simply allege that appellant artfully, skillfully and fraudulently, *etc.*, placed the small "o" in such a manner that at the time plaintiffs signed the settlement sheet, they did not observe or notice it. The allegation with reference to the "o" is not sufficient to constitute fraud in the making of the settlement. The "o" was in the settlement sheet when respondents signed the same, but they did not notice it—that is all. In pleading fraud or deceit in the making of a contract, the statement of facts as to how the fraud or deceit was committed must make it appear with reasonable certainty, (1) that the defendant made a representation or statement intending that the plaintiff should act upon it; (2) that the representation was false; (3) that the plaintiff believed the statement and acted upon it and was damaged. (*Power & Bro., Ltd., v. Turner*, 37

Mont. 521, 97 Pac. 950.) Neither do the facts alleged show a concealment of the "o" by appellant.

Appellant makes the point that it appears from the complaint that the parties thereto had a mutual accounting and settlement in writing as to and covering the sale set out in the complaint, and an account was then and there stated between them as to the sale and the commission; and the items of the original account could not be "inquired into or surcharged except upon the ground of fraud, error or mistake in the ascertainment of the balance, and then only when the fraud, error or mistake upon which the agreement is sought to be impeached is specifically alleged." (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427.) No fraud, error or mistake is charged as to the statement of account in this case. That one item is disputed will not prevent the amount of the others from becoming an account stated. (*Mulford v. Caesar*, 53 Mo. App. 263.) The objection to some only of the items in the account will admit the others to be correct. (*Joseph v. Southwark Foundry & Mach. Co.*, 99 Ala. 47, 10 South. 327; *Burns v. Campbell*, 71 Ala. 271, 286; *Tuggle v. Minor*, 76 Cal. 96, 18 Pac. 131.) There may be an account stated between a factor and his consignor. (*Smith v. Marvin*, 27 N. Y. 137.) The fact that the account was not made out between the parties but that one made it and sent it to the other, who received and acquiesced in it, will not prevent its being an account stated. (*Toland v. Sprague*, 37 U. S. (12 Pet.) 334, 9 L. Ed. 1107.) A letter containing an account, if rendered by one to the other of the parties to the account and retained by the latter without objecting within a reasonable time, will be evidence of the correctness of the account. (*Smith v. Kennedy*, 1 Wash. Ter. 55.)

*Messrs. Foot & MacDonald*, for Respondents, submitted a brief; *Mr. T. H. MacDonald* argued the cause orally.

Respondents find fault with the complaint in that it does not set forth the fraud of the appellant with sufficient certainty. His remedy is not a general demurrer but a demurrer under

subdivision 7, section 6534, Revised Codes. "A general charge of fraud may be sufficient, however, in a case not susceptible of a more specific charge." (*McLachlan v. Staples*, 13 Wis. 448.)

The most favorable view to which appellant is entitled from the settlement sheet is that it does not state what the commission to be paid respondents is to be, but leaves that in ambiguity. The complaint alleges the settlement was prepared by appellant. That ambiguity or uncertainty must be construed most strongly against the appellant who is responsible for it. (*Finley v. School District*, 51 Mont. 411, 153 Pac. 1010.)

The following cases hold that one may declare on the original contract and impeach a subsequent account stated for fraud and mistake. "Where items are omitted plaintiff may sue for correct balance." (*Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. Ed. 319, 1 Sup. Ct. Rep 178.) "It is doubtless true that the creditor may for certain purposes disregard the settlement and sue on the original items." (*Porter v. Chicago, I. & D. Ry. Co.*, 99 Iowa, 351, 68 N. W. 724.)

The commission to be paid respondents is so vaguely expressed as to be wholly unascertainable. Therefore the instrument is void. (Rev. Codes, sec. 4999.)

The rule is that evidence of the interpretation placed on a contract by the parties is, in general, not admissible as an aid in its construction, but such interpretation and understanding is receivable for some purposes. In the instant case the mistake of the respondents in signing the contract is one of the issues. In such cases evidence of the understanding of the parties is admissible. (*Douglass v. Reynolds*, 7 Pet. (U. S.) 113, 8 L. Ed. 626; *Lombard v. Martin*, 39 Miss. 147; *Glenn v. Lehnen*, 54 Mo. 45; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463.) "The understanding of the party is admissible in evidence where such understanding is a fact independently relevant." (*Pottkamp v. Buss*, 5 Cal. Unrep. 462, 46 Pac. 169; *People v. Clark*, 106 Cal. 32, 39 Pac. 53.)

The instrument set forth in the answer is so vague and uncertain in its terms that it is impossible to determine what was

intended thereby by way of commissions to be paid to the respondents. Therefore it is void for uncertainty. (Rev. Codes, sec. 4999; *Price v. Stipek*, 39 Mont. 426, 104 Pac. 195.)

In this case there is an issue of fact as to what the interpretation of the written instrument, Exhibit "B," should be. The writing is ambiguous and must be solved by extrinsic unconceded facts. It then becomes a matter for the jury to determine what inference is to be drawn from those facts, and there is no dispute as to the legal meaning of the same, so there is no occasion for any construction by the court. (38 Cyc. 152.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1908, Bjerneby Bros., respondents herein, by an agreement in writing became the representatives of the Minneapolis Threshing Machine Company for the sale of its farm machinery in Flathead county. The contract provided that sales should be made at prices fixed by the company and that the commission to the agents should be computed upon that basis. This action was brought to recover commissions alleged to be due plaintiffs on account of the sale of a threshing outfit, including stacker, to one Clark Meade.

It is alleged that the list price of the machinery was originally \$4,005.80, but that by directions of the company it was sold to Meade for \$3,041.85, and that the defendant has refused to pay the commission or any part of it. The answer contains certain admissions and denials, not now material, and an affirmative defense to the effect that plaintiffs and defendant had stated an account between them and had mutually agreed that there was not anything due from defendant to plaintiffs as commissions on the Meade sale. The allegations of this affirmative defense were put in issue by reply, and a trial of the cause resulted in a judgment in favor of plaintiffs for \$963.95, interest and costs, from which judgment defendant appealed.

We deem it unnecessary to consider appellant's specifications of error in detail. The real questions in issue arise over the

proper construction of the agency contract, in view of certain correspondence between the parties, and the force or effect of a so-called settlement agreement, Exhibit "B."

There is not any conflict in the evidence. The negotiations with Meade were initiated by the company through Wood, its Spokane agent. Different terms had been under consideration, but a proposal in the form of an order had been submitted to the company for approval or rejection. By the terms of this proposal, Meade was to turn over to the company a second-hand engine, give his notes for sums aggregating \$2,650, and pay the freight on the machinery he was to purchase. It was while this proposition was before the company that the business was first called to the attention of plaintiffs, in a letter from the company to them dated August 5, 1908. By that letter the company disclosed the terms of the proposed sale, but indicated its intention to decline to fill the order because of the insufficiency of the security. Plaintiffs were directed to see Meade and inform him that, if he would execute a real estate mortgage as additional security, the proposition would be considered; otherwise, it would not be. The letter concluded: "If you can get the thing fixed up with him, let us know right away, and we can fill the order promptly, as we have the goods ready to ship." In compliance with the directions given, plaintiffs obtained the order upon the terms already mentioned, but with the additional security required, and this order was accepted by the company and the machinery shipped and delivered. On August 13 the company in a letter to plaintiffs acknowledged the receipt of the Meade notes and securities, and inclosed "settlement sheets" in duplicate, one of which was signed by plaintiffs and returned to the company. On the debit side of this sheet the machinery sold to Meade is listed at \$4,005.80. On the credit side are enumerated the Meade notes for \$2,650, and the further items as follows:

1 14 H. Port Huron engine net.....	391.85
Commission 25 per cent on \$3,755.80.....	938.95
Commission 10 per cent on 250.00.....	25.00

The account was thus balanced, the total on each side being \$4,005.80. The sheet concluded with these recitals:

"Upon receipt of settlement as above, there will be due dealer, as per terms of contract commission certificates .....0

"Com. to be paid when old engine is resold and Co. gets their net out of it.

"This settlement is correct, there are no claims for shortage, etc."

Notwithstanding plaintiffs were the procuring cause of the [1] sale and had performed their services under the direction of the company, it is now insisted that, by signing this sheet, an account was stated, whereby plaintiffs agreed that they should not receive any compensation for their labor. In support of our conclusion that an account was not stated, we quote the following from the opinion of this court in *Voight v. Brooks*, 19 Mont. 374, 48 Pac. 549: "An 'account stated' means a balance ascertained between the parties to a settlement, and, where plaintiff is able to show that the mutual dealings which have occurred between two parties have been adjusted, settled and a balance struck, the law implies a promise to pay that balance. (*Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300.) It is strictly evidence of the admission of a debt; it is the acknowledgment of the existing condition of liability between the parties. 'From an account stated the law implies a promise to pay whatever balance is thus acknowledged to be due.' "

In the letter accompanying the sheet the company wrote: "You will notice we are not figuring any commission *due you at this time.*" While on the sheet, which was a printed form, was written: "Commission to be paid when old engine is resold and company gets their net out of it." When it is recalled that plaintiffs' commission was fixed by the agency contract, it cannot be said that, by terms so indefinite and uncertain as those employed in this settlement sheet, plaintiffs agreed that nothing whatever should be paid them for effecting the Meade sale.

It is suggested that the company could not have intended to pay any commission on a sale at such a reduced price, otherwise

it would have suffered a distinct loss. The sale price, \$3,041.85, is exactly the net amount which the company would have received if the sale had been for \$4,005.80 and commissions had been paid according to the terms of the contract. The force of the suggestion is destroyed by the record made by the company itself. In its letter to plaintiff dated August 11 it said: "You can tell Meade for us that he has got the cheapest and best outfit we ever sold in the state of Montana, but it is all right if he only makes good with it and we open the way for good trade, *we will try to forget the loss that we are making.*" If it paid no commission, it could not suffer any loss, and it is only upon the theory that it contemplated the payment of commission in some amount that its statement is intelligible.

It is further insisted that plaintiffs cannot claim commission [2] because they sold for less than the list price and extended the time of payment over a longer period than their contract authorized. The sale price and terms of payment, however, were not fixed by these plaintiffs, but by the defendant itself. Paragraph 10 of the agency contract provided: "The company reserves the right to change or abridge at any time the terms of sale or the factory list price of its machinery, repairs and supplies." By directing plaintiffs to sell upon the terms and at the price stated, the company elected to exercise the right reserved to it, and for the purposes of the Meade transaction the longer terms became the contract terms, and \$3,041.85 became the list price upon which commission should be calculated.

Neither is there any merit in the suggestion that plaintiffs [3] cannot claim commission upon the amount represented by the value set upon the second-hand engine. That particular term of the sale was also imposed by the company. Plaintiffs had no choice in the matter, and as to them it represented so much money.

The agency agreement provides that commissions upon time [4] sales shall be due only as the installments are paid to the company. One of Meade's notes for \$600 had not been paid



when this action was commenced, and plaintiffs are not entitled to commission on that amount until it is paid.

The sale price of the stacker was \$225, and of the thresher proper, \$2,816.85. Upon the former, the commission provided by paragraph 11 of the contract is \$25, and upon the latter (after deducting \$600 for the unpaid note) the commission is 25 per cent or \$554.21, making a total of \$579.21, for which the verdict should have been returned and the amount upon which interest should have been computed.

The cause is remanded to the district court, with directions to modify the judgment accordingly, and, when so modified, it will stand affirmed. Each party will pay his costs of this appeal.

MR. CHIEF JUSTICE BRANTLY CONCURS.

MR. JUSTICE PIGOTT did not hear the argument and takes no part in the foregoing decision.

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WHEELER, RESPONDENT, v. MCINTYRE, APPELLANT.

(No. 4,157.)

(Submitted October 12, 1918. Decided November 20, 1918.)

[175 Pac. 892.]

*Injunction—Real Property—Landlord and Tenant—Lease of Building—Sale of Land—Complaint—Trespass.*

*Injunction—Leases—Sale of Land—Removal of Building—Complaint—Sufficiency.*

1. Complaint in an action by the assignee of a lease of a building used for business purposes, the lease being for a term of years still existing, to enjoin the owner thereof from moving it to another site, *held* sufficient to withstand a general demurrer.

*Real Property—Lease of Building—Implied Inclusion of Land.*

2. Where the owner of land leases a building for a term of years without expressly including the land, he thereby demises the latter unless the contrary intention is manifest.

[As to the word "house" in lease as including land, see note in *Ann. Cas.* 1914B, 1239.]

Same—Lease for Years—Nature of Estate.

3. A lease for years is a chattel real, both under section 4485, Revised Codes, and the common law.

Same—Injunction—Complaint—Unnecessary Allegations.

4. To entitle the assignee of a lease for years to an injunction against the removal of the building in which he conducts business, he need not show that the threatened wrong would, if committed, interfere with or destroy his business or that defendant is unable to answer in damages.

Same—Injunction—Continuing Trespass—Multiplicity of Actions.

5. Injunction lies to prevent a multiplicity of actions at law for damages which would be caused by the threatened commission of continuing and repeated trespasses upon plaintiff lessee's estate in the building attempted to be moved to another site.

Same—Rights of Lessee.

6. Knowledge in the assignee prior to taking over a lease of a building that the owner had sold the lot and contemplated removal of the structure to another site before expiration of the lease, could not affect his rights under the lease or deprive him of the right to an injunction restraining removal of the building.

Same—Injunction—Doctrine of Comparative Injury.

7. In determining whether injunction should issue to restrain the threatened removal of a building held under lease, the doctrine of relative or comparative injury and inconvenience should be resorted to only when the party whose rights are threatened with invasion or destruction can be thoroughly protected.

*Appeal from District Court, Hill County; W. B. Rhoades, Judge.*

ACTION by W. H. Wheeler against Margaret McIntyre for injunction. From a judgment for plaintiff, defendant appeals. Affirmed.

Cause submitted on brief of Counsel for Appellant.

*Messrs. Pray & Callaway and Mr. L. V. Beaulieu, for Appellant.*

The rule is that equity will not interpose to restrain the mere violation of a municipal ordinance at the instance of an individual. It will so interpose its extraordinary powers only when such acts amount to nuisances, or where the applicant for its protection shows that by reason of the violation of the ordinance some special and irreparable injury will result to him. (*Rice v. Jefferson*, 50 Mo. App. 464; *King v. Hamill*, 97 Md. 103, 54 Atl. 625; *O'Brien v. Lower*, 158 Ind. 211, 61 N. E. 1004; *Young v. Scheu*, 56 Hun, 307, 9 N. Y. Supp. 349; *Sheldon v. Weeks*,

51 Ill. App. 314; *Jenks v. Williams*, 115 Mass. 217; *Manufacturers' Gas & Oil Co. v. Indiana etc. Oil Co.*, 155 Ind. 566, 58 N. E. 851; *People ex rel. L'Abbe v. District Court*, 26 Colo. 386, 46 L. R. A. 850, 58 Pac. 604; *Tiede v. Schneidt*, 99 Wis. 201, 74 N. W. 798; *Meredith v. Triple Island Gunning Club*, 113 Va. 80, Ann. Cas. 1913E, 531, 38 L. R. A. (n. s.) 286, 73 S. E. 721; *Siskiyou Lumber & Mercantile Co. v. Rostel*, 121 Cal. 511, 53 Pac. 1118.)

Inasmuch as the facts brought before this court do not reveal any of the fundamentals upon which the statements of a witness as to cause and effect can rest, the statement of the respondent as to the result of moving the building was inadmissible. Without it there is nothing to show that his estate would in all probability be destroyed under any view of the facts. (17 Cyc. 101; *Power & Bros. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Morrow v. Missouri Pac. Ry. Co.*, 140 Mo. App. 200, 123 S. W. 1034; *Wallace v. Jefferson Gas Co.*, 147 Pa. St. 205, 23 Atl. 416; *Pennsylvania Co. v. Mitchell*, 124 Ind. 473, 24 N. E. 1065; *Piper v. Woolman*, 43 Neb. 280, 61 N. W. 588; *Elliott v. Ferguson*, 37 Tex. Civ. 40, 83 S. W. 56.)

The decisions deny the right of an individual to invoke equitable interposition where the injury is not made to appear irreparable or where the inadequacy of compensatory relief is not made to appear. (*Boston etc. Min. Co. v. Montana Ore etc. Co.*, 23 Mont. 557, 59 Pac. 919; *Koufman v. City of Butte*, 48 Mont. 400, 138 Pac. 770; *Karl v. Pilkington*, 2 Alaska, 191.) Relief based upon merely nominal, technical, theoretical, problematical or speculative damages is not favored, lest, otherwise, courts in so acting be regarded as engines of oppression and vexation, which would be far distant from the object of their creation. (*Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502; *People v. Canal Board*, 55 N. Y. 390; *James v. Bondurant* (Iowa), 86 N. W. 274; *Swan Creek Twp. v. Brown*, 130 Mich. 382, 90 N. W. 38; *Jacob v. Day*, 111 Cal. 571, 44 Pac. 243; *In re Penn Development Co.*, 220 Fed. 222, 224; *Freeman v. Scherer*, 97 Kan. 184, 154 Pac. 1019.)

MR. JUSTICE PIGOTT delivered the opinion of the court.

By the judgment in this action defendant McIntyre (who will hereinafter be called the defendant) is perpetually enjoined from removing, or attempting to remove, and from digging, excavating, and removing the ground and foundation from beneath, a wooden building known as the McIntyre Opera House. On this appeal by her from that judgment her counsel have argued at length the several specifications of particulars in which, as she asserts, the trial court committed error prejudicially affecting her rights. The plaintiff has not seen fit to state or present his contentions, nor has he appeared, on this appeal.

1. Defendant's first contention is that the complaint, her general demurrer to which the court below overruled, fails to state facts sufficient to constitute a cause of action, or to invoke the injunctive jurisdiction of equity. Its allegations may be paraphrased and epitomized thus:

The McIntyre Opera House, a wooden (or, according to the complaint, a "wood frame") building, having a stone foundation imbedded in the earth, at all the times mentioned in the complaint stood, and yet stands, on certain lots situate within the fire limits of Havre. In December, 1915, and while defendant was the owner of the lots as well as of the building, she leased the building, describing and identifying it as being on these lots, to strangers for the term of three and a half years, with the privilege of three years additional, at the monthly rental of \$100. In October, 1916, defendant conveyed the building and lots to her codefendant. In March, 1917, plaintiff became the assignee of the lease and has kept its covenants. As such assignee he is in possession of the building, and therein carries on the business of exhibiting moving pictures and presenting theatrical performances. An ordinance of Havre prescribes that—"no wood frame building shall be moved from one place to another within the fire limits, nor from without to within the fire limits, except to a different portion of the same lot upon which it may stand." Defendant wrongfully and un-

lawfully threatens to remove the building from its present site, and has made actual preparation for its removal by digging and excavating the ground underneath it, and by removing parts of the stone foundation; over plaintiff's protest, she has persisted from day to day in committing such wrongful acts. Should the building be moved to a place beyond the fire limits, or should defendant be permitted to move the building, as she now threatens and is preparing to do, or should she be allowed to continue in such digging and excavation of the earth and removal of the foundation, the estate owned and enjoyed by plaintiff in the building and lots will be totally destroyed, to his irreparable injury. The plaintiff has never consented to or authorized the perpetration of any of the wrongs charged, nor to the removal of the building either within or without the fire limits. He prays for an injunction restraining defendant from moving the building off its present site, and from digging, excavating and removing the ground and foundation beneath the building.

(a) Defendant insists that the only cause of action attempted to be stated is based upon the ordinance pleaded; that the ordinance does not forbid the moving of such a building from a place within to a place without the fire limits; that the allegation—assumed by her to be the gravamen of the action—that if the building be moved to a place beyond the fire limits plaintiff's estate will be destroyed, has no relation to the ordinance; that plaintiff fails to charge defendant with intention or threat to move the building without the fire limits, but, on the contrary states only that she threatens to remove it from its present site. From these premises she deduces the conclusion that the ordinance is inapplicable, and intimates that, even if it be applicable, equity will not restrain its mere violation at the instance of a private litigant, except where the wrongs threatened amount to a nuisance, or he shows that some irreparable injury, special to himself, would ensue.

But the major premise is wrong, as is also the assumption that the threat to move the building beyond the fire limits constitutes

the essence of the cause of action. All reference to the ordinance and the threats to move the building to a place beyond the fire limits may be eliminated without making the complaint insufficient, as will appear by application to the state of facts remaining of a few fundamental and long-established principles of law.

After elimination of these matters in respect of the ordinance [1] and fire limits, the complaint shows, in substance, that defendant, without plaintiff's consent or authority and against his protest, threatens to, and, unless restrained, will, move from its present site a wooden building standing, with stone foundation imbedded in the earth, on certain land, which building was leased at a monthly rental by her to plaintiff's assignors for a term of years still existing, the lease having been made prior to her conveyance of the land and building; that the building, with the land, is occupied by plaintiff under the lease and used by him in conducting his business; that in the execution of her threat she continues from day to day to dig and excavate the earth under the building and remove parts of its foundation.

Defendant misconceives the character and dignity of the property owned by plaintiff as assignee of the lease. She regards it as strictly personal property, and invokes the rules announced by this court in *Eisenhauer v. Quinn*, 36 Mont. 368, 122 Am. St. Rep. 370, 14 L. R. A. (n. s.) 435, 93 Pac. 38. In that case, however, the house was a chattel personal, and this court held that an injunction should not have been granted against its removal by the sheriff under writ of execution, there being no showing that the sheriff was insolvent or his bond not sufficient, or that the removal of the house could not be compensated in damages. The *Eisenhauer Case* is not pertinent.

When the owner of land and the building affixed thereto [2] leases the latter for a term of years without expressly including the former, he thereby demises the land unless the contrary intention is manifested. Defendant owned the land and likewise the building which was then and is now affixed thereto. By leasing the building to plaintiff's assignors for a term of

years, she effectually demised the land. This familiar doctrine need not be exemplified by citation of authority. The Revised Codes, sections 4424, 4425 and 4427, enact, among other things, that real, or immovable, property consists of land and that which is affixed to land, by being imbedded in it, as in the case of walls, or permanently resting upon it, as in the case of a building.

True, the right of plaintiff which he seeks to protect against [3] wrongful invasion and consequent destruction, is a chattel interest. It is a chattel real, as distinguished from a chattel personal. Section 4481 of the Revised Codes, declares estates for years to be estates in real property, and section 4485 defines chattels real to be estates for years; and it may be noted in passing that these sections work no change in the common law; for in Co. Litt., secs. 177, 118b, it is said that chattels real are "reall, because they concerne the reality, as tearmes for yeares of lands or tenements." Blackstone in the second volume of his Commentaries, defines them to be "such as savor of the realty, such as leases for years of land." So it was held in *Hyatt v. Vincennes National Bank*, 113 U. S. 408, 28 L. Ed. 1009, 5 Sup. Ct. Rep. 573, where it was decided that a lease for years is a chattel real which must be sold as an interest in land, not as personal property, which is also provided by Revised Codes, section 6836. In *Milliken v. Faulk*, 111 Ala. 658, 20 South. 594, the court said: "'A chattel real \* \* \* is an immovable thing, attached to and issuing out of lands,' and this we understand to be universally correct. A lease is a contract \* \* \* for the possession \* \* \* of lands and tenements. \* \* \* Strictly speaking, it is not a term applicable to chattels, which are not attached to or issue out of realty. A lease is a conveyance or grant."

The complaint, then, shows that plaintiff is the owner and entitled to the quiet and peaceable possession and enjoyment of an estate for years in the land and the building resting upon it, free from interruption or molestation by defendant; that defendant has wrongfully committed many destructive trespasses upon plaintiff's estate, and, unless restrained, will continue to

do so, even to the extent of moving the building from the land; that the execution of the threat will utterly destroy plaintiff's estate in the land, and deprive him of the right, which he now has, to occupy the building on its present site. While neither the wrongs done nor those threatened are, or would be, technical waste, they are necessarily destructive of plaintiff's estate, and irreparable in their character and very nature. To justify injunctive process in such circumstances, there is no need that the wrongs threatened would, if committed, interfere with or destroy plaintiff's business, nor is it necessary to show that defendant is unable to answer in damages.

For present purposes it is not of moment whether the conduct of defendant be characterized as tortious, or be considered merely as breaches of the contract of lease, for in either event the complaint is sufficient to withstand a general demurrer. Her conduct was tortious, for plaintiff is the owner of the term, and the unlawful acts and threats are those of a stranger to such ownership. Her conduct was also a violation of her covenants contained in the lease.

(b) The complaint also states facts sufficient to warrant an injunction to prevent a multiplicity of actions at law for damages which would be caused by the commission of the continuing and repeated trespasses threatened.

The demurrer was properly overruled.

2. Parts of the material allegations of the complaint were admitted by the answer, and the others were proved at the trial.

During the trial, defendant sought, unsuccessfully, to show that plaintiff had consented to her moving the building; and while the tendency of the evidence was to prove that plaintiff's assignors had notice after the lease was made of defendant's purpose to move it, there was no proof that they ever consented. She established the fact that, when she sold the land to her co-defendant, she excepted the building and agreed to remove it by March 15, 1917; but this could not affect plaintiff's estate, which had been theretofore created in his assignors. She sought, also, to prove that plaintiff had notice of the transaction



with her codefendant before the lease was assigned to him, but in this effort she was likewise unsuccessful; but, if the fact be as she asserts, her plight would not be less, nor plaintiff's rights diminished, for the lease under which plaintiff holds antedates the contract of sale.

Suggestion is made that the evidence shows that the threatened destructive trespasses, if perpetrated, would not work as great injury to plaintiff as the perpetual injunction will damage defendant; but the facts in the present case clearly exclude application of the doctrine of relative or comparative injury and inconvenience. The practice of weighing the relative or comparative injuries and resulting damage which will probably be suffered by the parties, respectively, should be resorted to only when the party whose substantial rights are threatened with invasion or destruction can be thoroughly protected.

The record fails to show error prejudicial to defendant, and the judgment is affirmed. Let *remittitur* issue forthwith.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

Motion for rehearing denied December 5, 1918.

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IN RE BURKE.

(No. 4,293.)

(Submitted November 12, 1918. Decided November 21, 1918.)

[176 Pac. 421.]

*Attorney and Client—Retention of Funds—Disbarment—Suspension.*

Attorney and Client—Retention of Funds—Disbarment or Suspension.

1. Where an attorney admits his guilt of professional misconduct consisting of failure for some thirty-one months to account to his client for

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On the question of disbarment or suspension of attorney for withholding client's money or property, see note in 19 L. R. A. (2d s.) 414.

moneys collected in satisfaction of judgments procured in the latter's favor, the supreme court must, under sections 6418 and 6420 of the Revised Codes, either disbar him permanently or suspend him for a limited period, according to the gravity of the offense.

[As to disbarment of attorneys, causes and proceedings therefor, and the power of courts to disbar, see notes in 95 Am. Dec. 333; 45 Am. St. Rep. 71.]

Same—Suspension.

2. *Held*, in view of extenuating circumstances exceptional in their nature, and the fact that accused had made full payment to his client of the moneys due him with interest, since commencement of disbarment proceedings against him, that suspension for a period of ninety days is sufficient punishment for the offense referred to above.

PROCEEDING for the disbarment of E. W. Burke. Respondent suspended for ninety days, with privilege of reinstatement upon showing of good character.

*Mr. E. W. Burke, pro se.*

*Mr. S. C. Ford, Attorney General, for the State.*

MR. JUSTICE PIGOTT delivered the opinion of the court.

This is an original proceeding against E. W. Burke, Esq., an attorney and counselor at law of the courts of Montana, for disbarment. It has been submitted upon the report of Ira T. Wright, Esq., special counsel appointed by this court to investigate the charge, the complaint of the attorney general, and the answer of the accused. The malpractice, or misconduct in [1] his profession, of which the accused stands charged, consists of his retention of, and failure for some thirty-one months to account for, \$104.75 which had been paid to him in satisfaction of judgments procured in two actions by him in behalf of his client. The accused frankly admits the charge to be true in substance, which is tantamount to pleading guilty. It therefore becomes the duty of the court, under Revised Codes, sections 6418 and 6420, to adjudge that the accused be deprived either permanently or for a limited period, according to the gravity of the offense, of the right to practice as an attorney or counselor in the courts of this state.

The misconduct of which the accused confesses his guilt involves such a degree of moral turpitude as would ordinarily justify—indeed, demand—judgment of expulsion from the profession whose honor he has stained and whose reputation for fidelity his malpractice tends to impair. His deviation from [2] the straight and narrow path is not to be treated lightly. There are, however, in this case extenuating conditions and circumstances exceptional in their nature which, while not excusing—much less justifying—his unfaithfulness, do palliate the seeming flagrancy and gravity of his delinquency as it is made to appear by the bald statement of the facts, and which appeal to the clemency of the court and justly invoke the exercise of its discretion. It is not necessary to describe those conditions or recite those circumstances. We may remark, however, that we are inclined to believe that the accused never intended to make permanent appropriation of his client's funds and that he purposed remitting the full sum, less his reasonable fees, as soon as he should become financially able to do so; and that his delinquency resulted in part from the resentment which he felt because the client had not reimbursed him for costs theretofore expended and had not paid his fees theretofore earned in the actions, in part from failure to bear in mind the distinction between the relation of debtor and creditor and that of trustee and beneficiary, in part from carelessness, and in part from dire poverty. It may be added that since this proceeding was commenced he has paid to the client the full amount due him, with interest.

We feel that the penalty of permanent disbarment would be too severe, and that a milder penalty will satisfy the ends of justice and the purposes sought to be accomplished.

The accused having been convicted of the malpractice charged in the complaint, it is adjudged that he be, and he is hereby, deprived of the right to practice as an attorney or counselor in the courts of the state of Montana for the period of ninety days from and after November 20, 1918, at the expiration of which time he may be reinstated as an attorney and counselor at law

upon satisfactory proof being made to this court of his good moral character meanwhile.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

DE YOUNG, RESPONDENT, v. BENEPE, APPELLANT.

(No. 3,949.)

(Submitted September 19, 1918. Decided November 21, 1918.)

[176 Pac. 609.]

*Vendor and Purchaser—Contracts of Sale—Breach by Purchaser—Effect—Work and Labor—Quantum Meruit—Full Performance—Burden of Proof.*

Verdicts—When Against Law.

1. A verdict which is contrary to the instructions, is contrary to law.

New Trial—Disregard of Instruction by Jury.

2. Where the jury has disregarded a specific instruction, the supreme court will not inquire whether it is correct in point of law, but will direct a new trial, unless affirmance is required under section 7118, Revised Codes, prohibiting reversal where the proper result was reached notwithstanding the error committed.

Vendor and Purchaser—Contracts of Sale—Breach by Purchaser—Effect.

3. Where the vendor of land had exercised his option reserved to him in a contract of sale of land, by ousting the vendee because of failure to make payments as stipulated, the latter was relieved from further payment of taxes, interest, etc., and his refusal to do so could not thereafter be made the basis of an action by the vendor.

Work and Labor—Quantum Meruit.

4. One who has fully performed an express agreement for services may sue upon the *quantum meruit*, the limitation of recovery being the stipulated price.

Same—Quantum Meruit—Full Performance—Burden of Proof.

5. Where a purchaser of land, unable to carry out the provisions of his contract, had entered into a special agreement with the vendor, under which he was required to do certain work as well as to surrender the original contract and possession of the land, he was required to show, as a condition precedent to his right to recover on a *quantum meruit*, that he had fully performed in all three particulars.

*Appeal from District Court, Gallatin County; Ben B. Law, Judge.*

ACTION by Ike De Young against Frank L. Benepe. From a judgment in favor of plaintiff, and an order denying him a new trial, defendant appeals. Reversed and remanded.

*Mr. George D. Pease*, for Appellant, submitted a brief, and argued the cause orally.

*Mr. George Y. Patten*, for Respondent, submitted a brief, and argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The trial of this cause in the district court resulted in a verdict and judgment in favor of plaintiff. Defendant has appealed from the judgment and order denying him a new trial.

The complaint contains two counts. The first alleges that on June 3, 1913, the plaintiff sold and delivered to defendant, at his special instance and request, on his farm in Gallatin county (described as "Sec. 15, Tp. 2 S., R. 2 E."), hay and grain of the reasonable value of \$91, no part of which has been paid. The second alleges that between June 4 and October 2, 1913, the plaintiff furnished the defendant on his said farm, at his special instance and request, work of himself and his horses in preparing the land for a crop for the season of 1914, of the reasonable value of \$783, no part of which has been paid.

The defendant in his answer joins issue on both counts, and alleges as an affirmative defense, by way of a counterclaim, the following: That on October 23, 1911, the plaintiff entered into a contract with one Berglund, now deceased, wherein the latter agreed to convey to the plaintiff the farm described in the complaint, upon these conditions: That plaintiff should pay Berglund therefor, at the Manhattan State Bank of Gallatin county, \$25,600, \$800 upon the execution of the contract, and the balance in ten equal annual installments on or before November 1st of each year, from 1913 to 1922, inclusive, with interest at seven per cent per annum on the sum remaining unpaid from time to time, except that plaintiff should have the privilege of

paying only one-half of the interest falling due on November 1, 1912, and the remaining half, without interest, on November 1, 1913; that plaintiff should pay all taxes and legal impositions levied upon the land subsequent to the year 1911; that in case plaintiff should make default in any of the payments or interest thereon as stipulated in the contract, or fail to perform any obligation assumed by him therein, the whole of the purchase price, with the interest thereon, should, at the election of Berglund, become at once due and payable, and the contract be forfeited and determined upon his giving the plaintiff thirty days' notice in writing of the amount due, and of his intention to cancel and determine the contract; that plaintiff should thereupon forfeit all payments made up to that time, as well as all improvements upon the land, and Berglund should have the right to re-enter and take possession; that time of payment should be an essential part of the contract, and that all the covenants and agreements contained in it should extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties; that on May 15, 1913, the defendant became the owner and holder of the contract; that plaintiff had failed to pay any interest upon the purchase price as provided therein; that on June 3, 1913, there was due defendant interest at the rate of seven per cent on \$24,800 from October 23, 1911, amounting to \$2,786.75; that plaintiff had also failed to pay the taxes for the year 1912, amounting to \$68.41, which defendant had paid; that on June 3, 1913, after negotiations between plaintiff and defendant relating to the payment by plaintiff of the interest due and the taxes paid by defendant, it was agreed between them that plaintiff should continue in possession of the land until the fall of that year; that he should plow and prepare the land for a crop for the year 1914; that he should use his horses, furnishing for their maintenance the hay and grain referred to in the complaint; that defendant should furnish other horses and men necessary to aid in doing the work, and food for the maintenance of the men and horses; that plaintiff should have the right until fall to sell the land or to raise money

sufficient to pay the past-due interest and taxes paid by the defendant, and also to reimburse defendant for the use of the other horses, for the wages of the men, and the value of the food furnished by him; that if he failed to do this he should surrender the land to the defendant, who thereupon would release the plaintiff from the contract of purchase, so that neither party thereafter should have any claim thereunder against the other; that, in pursuance of this agreement, plaintiff remained in possession of the land, and prepared it for a crop, furnishing his horses, harness and such implements as he had, and also the hay and grain referred to in the complaint, the defendant furnishing the additional men and horses necessary to do the work, together with food for the men and the horses other than that furnished by plaintiff; that on October 4, the plaintiff having failed to sell the land and to pay the interest and the taxes paid by the defendant, and to reimburse the defendant for the horses and men and the food furnished by him, defendant gave him notice in writing, as provided in the contract of sale, that the contract was terminated, and demanded that at the end of thirty days from that date plaintiff should surrender to him the possession of the land; that the plaintiff failed and refused to surrender possession or to comply with said notice; that on January 24, 1914, this defendant brought an action against the plaintiff in the district court of Gallatin county to recover possession of the land and for damages for its detention; that such proceedings were had therein that on February 16, 1914, a decree was entered therein in favor of the defendant, the defendant by stipulation waiving all damages against the plaintiff; that the plaintiff thereupon delivered possession of the land to the defendant; that plaintiff has never paid the interest which accrued on the purchase price under the contract of sale, nor the taxes paid by defendant, and that there is due from the plaintiff in this behalf the sum of \$3,080.36, after allowing the plaintiff the full amount claimed by him in the complaint. Judgment is demanded for this amount.

To this counterclaim a general demurrer was interposed by the plaintiff, which was overruled. In his reply plaintiff admits that he had entered into the contract with Berglund as alleged, that the defendant thereafter became the owner of it, and that on June 3 the plaintiff was in default in the payment of interest as therein provided. He denies that he remained in possession of the land under the agreement alleged by the defendant; and alleges that on the said date he surrendered possession to the defendant, who thereafter remained in possession; that on and after said date he furnished to the defendant the hay and grain and the work and labor of himself and horses as alleged in the complaint, and that he prepared the land for a crop under the direction of defendant. He admits that the action was brought as alleged by defendant, and that it resulted in a decree in defendant's favor. He denies generally all the other allegations in the counterclaim not specifically admitted.

Counsel assails the validity of the judgment on the grounds that the trial court erred to the prejudice of the defendant in certain rulings upon questions of evidence during the trial, in submitting instructions to the jury, and denying defendant a new trial because of the insufficiency of the evidence to justify the verdict.

Upon a careful consideration of the several rulings upon questions of evidence we have found no prejudicial error in any of them. We therefore pass them without special notice.

In paragraph 2 of its charge the court instructed the jury as follows: "You are instructed that the defendant set up a counterclaim in this action for unpaid interest due under the contract between plaintiff and Peter A. Berglund, dated October 23, 1911, for the sale to the plaintiff of section 15, township 2 south of range 2 east. The defendant admits the execution of this contract, and that on the fifteenth day of May, 1913, the defendant, F. L. Benepe, became the owner and holder of said contract, and that he was on said date, and ever since has been, the owner of all the right, title, and interest in and to the real estate described in said contract, being section 15, in township



2 south of range 2 east. The plaintiff further admits that he failed, neglected and refused to pay any interest on the purchase price for the land as provided in said contract, and that on the third day of June, 1913, there was due to the defendant from the plaintiff, Ike De Young, interest at the rate of seven per cent per annum on \$24,800 from the twenty-third day of October, 1911, and that such interest amounted at that time to \$2,786.75, and that plaintiff failed to pay the taxes levied on said land for the year 1912. Under these admissions it becomes incumbent on the plaintiff to prove, by a preponderance of the evidence, that he has paid, satisfied and discharged the amount of said interest, as provided in said contract, and unless the plaintiff has proved by a preponderance of the evidence that since the third day of June, 1913, he has paid to the defendant in this action the said sum of \$2,786.75, and interest on said \$24,800 at the rate of seven per cent per annum from June 3, 1913, to February 16, 1914, then your verdict must be for the defendant in this action for the full amount of said interest claimed by him. The defendant also sets up that he paid the county and state taxes for the year 1912, levied upon section 15, township 2 S. R. 2 E., amounting to \$68.41, and that the plaintiff has not repaid the said sum. The burden of proving the payment of these taxes is upon the defendant. If the defendant has proved by a preponderance of the evidence that he paid said taxes, then he is entitled to recover the sum from the plaintiff in this action, unless the plaintiff has proved by a preponderance of the evidence to your satisfaction that he has repaid the same to the defendant; but before the defendant is entitled to recover upon his counterclaim he must prove the material allegations by a preponderance of the evidence."

It being admitted in the reply that plaintiff was in default in the payment of interest, and it being shown by defendant's evidence without dispute that he had paid the taxes for the year 1912, counsel insists that this instruction was in effect a peremptory direction to the jury to find for the defendant, and that, since the jury manifestly disregarded it, the defendant is

entitled to a new trial without regard to whether it is correct [1, 2] in point of law, on the ground that the verdict is contrary to law. In view of the admissions and the undisputed evidence referred to by counsel, the verdict is clearly contrary to the instruction, and is therefore contrary to law. This court has frequently held that, when the record discloses that the jury has disregarded a specific instruction, it will not inquire whether the instruction is correct, but will direct a new trial on this ground. (*Murray v. Heinze*, 17 Mont. 353, 42 Pac. 1057, 43 Pac. 714; *King v. Lincoln*, 26 Mont. 157, 66 Pac. 836; *Allen v. Bear Creek C. Co.*, 43 Mont. 269, 115 Pac. 673.)

Counsel for plaintiff, to avoid the consequences of the rule announced in these decisions, has incorporated in the statement of the case his exceptions to the order of the district court overruling his demurrer to defendant's counterclaim, and an order denying his motion for a nonsuit thereon at the close of defendant's evidence, and invokes the provisions of section 7118 of the Revised Codes, which declare: "Whenever the record on appeal shall contain a bill of exceptions or statement of the case properly settled, setting forth any order, ruling or proceeding of the trial court against the respondent affecting his substantial rights on the appeal of said cause, together with the objection and exception of such respondent properly made and reserved, settled and allowed in such bill of exceptions, or statement, the supreme court on such appeal shall consider such orders, rulings or proceedings, and the objections and exceptions thereto, and shall reverse or affirm the cause on said appeal according to the substantial rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the trial court against the appellant where the record shows that the same result would have been attained had such trial court not committed an error or errors against the respondent."

These two orders were clearly erroneous. It is manifest that, [3] when the defendant had exercised his option to terminate the Berglund contract as therein provided, it was at an end

for all purposes as a binding obligation upon either party, and could not thereafter be made the basis of an action. The result was that the defendant was released from his obligation to make a conveyance of the land, and the plaintiff from his obligation to pay the purchase price, including the interest, and also the taxes for the year 1912. Thereafter the defendant could not be heard to assert that the plaintiff was bound to answer to him for a breach of the contract. He could not oust the plaintiff from the land, as he did, and then claim that plaintiff was indebted to him in any amount. The court should have sustained the demurrer, and thus eliminated the counterclaim entirely. Therefore, notwithstanding the decisions citing *supra*, the plaintiff would have been entitled to have the judgment affirmed under the statute, if the evidence was sufficient to justify the verdict. The statute was enacted for the express purpose of enabling this court to avoid reversing judgments and ordering new trials in cases in which the jury has reached a correct conclusion notwithstanding errors committed by the trial court. ✓

When we come to examine the evidence, however, we are constrained to the conclusion that it is not sufficient to justify the verdict. Plaintiff was the principal witness in his own behalf. His testimony is vague and indefinite. On his examination in chief he testified, in substance: That he had retained possession of the land purchased under the Berglund contract from the date of the contract until June 3, 1913; that on that date he turned the land over to the defendant; that thereafter he worked for defendant and under his directions; that he used all his horses in the work; that he, along with other men hired by defendant to assist him in preparing the land for a crop for the following year, fed the hay and grain referred to in the complaint, and when that was exhausted they bought more to feed his and other horses furnished by the defendant; that defendant told him to feed this and then buy more; that this was done for defendant because he had nothing to do with the land after June 3. Questioned as to who requested him to

work there after June 3, he said: "Mr. Benepe asked me if I would work there because the wheat was not sowed as yet; and the worms had eaten out the wheat that was sowed except 100 acres of wheat, which was good yet; and I turned it over to Mr. Benepe. He asked me if I would stay there and work if he fed horses and I work for him." He was then questioned at length as to the prevailing rate of wages for men, the rate *per diem* at which horses could be hired in that locality, the number of horses he had, and the number of days he was employed with his horses. On cross-examination he stated: "When Mr. Benepe came out there he asked me what the matter was—what was the reason that I wanted him to come out—and I told him that I didn't have any money to farm the place any more, and the worms had eaten part of the crop, and that I couldn't make the payments in the fall and I didn't know what to do. Then he asked me if I would stay there and work for him. He asked me, if he would take the place, if I would stay there and work for him, and I told him that I could. Then he asked me how much I wanted, and I told him I had \$1,200 in the place when I started, and if I could get that out I would stay there and work for him—that is, if I could get the \$1,200 back out of it. I told him if I could get the \$1,200 back that I had put in that I would stay there and work until the land was clean again. When I got the land, part of it was prairie, and I broke 240 acres, and the rest of the land was in crop by another party when I got it. When I told him that I wanted my \$1,200 back, and I would stay there until the land was clean, he asked me, just before he left, if he paid me the \$1,200 if I would return the contract I had with Mr. Berglund, and I told him I would. At this time he was sitting on a log out there beside the cabin. Then he talked about how he wanted to send men out and all that kind of stuff. \* \* \* Q. Was the arrangement with Mr. Benepe that you were not to deliver possession to him unless you got the pay? A. I don't understand that right." The question being repeated, he answered: "Yes, he asked me if I would—if he would pay me if I would return the contract, and

I said, 'Yes.' The arrangement was I was to leave the land if he would pay me for this work; if he would pay me the \$1,200 that we talked about that I had in it; if he would pay me that the arrangement was I would leave the land and return the contract. The \$1,200 was not for this work, but it was the money that I had put in the land. That was the arrangement that I had on the 3d of June. I told you that the reason that I didn't leave the land in the fall of 1913 was that I hadn't received any pay—I didn't get my \$1,200. \* \* \* Q. Now, was there anything said in this conversation that you said you had with Mr. Benepe on the 3d of June, 1913, about any price that was to be paid to you for your teams or your labor? A. No; I told him if I had \$1,200 out of that I would be satisfied and would stay there until fall. Q. Then you say now, Mr. De Young, that the arrangement that Mr. Benepe was to pay you \$1,200 was to include your labor and the teams and everything, and you were to get off by fall. Was that it? A. Yes, sir. Q. That was the arrangement? A. Yes, sir."

Peter Van Dyken, the only other witness who testified for plaintiff, after being questioned as to the prevailing rate of wages for men and the rate paid for horse hire, stated that he had a conversation with defendant about July 13, when the witness was employed by him to assist the plaintiff, during which, in answer to an inquiry by witness if the plaintiff "had thrown up the place," the defendant said he had. Nowhere in the evidence does it appear that plaintiff then or thereafter surrendered the Berglund contract to defendant, or that he ever offered to do so, or that he offered to surrender possession of the land.

This testimony was not aided in any way by that of the defendant. On the contrary, the testimony of the defendant controverted that of the plaintiff and his witnesses, and tended to establish the agreement set out in the counterclaim.

Plaintiff brought his action in *assumpsit* instead of on the [4] special agreement, upon the theory that, having fully performed the agreement on his part, he was at liberty to count

on the implied *assumpsit*, the limitation of recovery being the stipulated price. There is no doubt as to the correctness of this theory. The course adopted by counsel has directly or impliedly been recognized as proper by this court in the following cases: *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241; *Cook & Woldson v. Gallatin R. Co.*, 28 Mont. 509, 73 Pac. 131; *McFarland v. Welch*, 48 Mont. 196, 136 Pac. 394; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.

That the special agreement was entire is obvious from the fact [5] that the consideration was entire, and that the defendant was not to become indebted to plaintiff until he had done the work, surrendered the contract, and given up possession of the land. To make out his case, therefore, plaintiff was bound to show that he had fully performed the agreement on his part; in other words, that, besides doing the work, he had surrendered the contract, and with it the possession of the land. (*Riddell v. Peck-Williamson H. & V. Co.* and *Waite v. Shoemaker*, *supra*.) Now, the evidence, as pointed out above, fails to show a surrender of the contract. So far as it tends to show anything in this regard, plaintiff retained possession of it and all the rights conferred by it. In addition to this, it is admitted by plaintiff in his reply that he remained in possession of the land until he was ousted by judgment in the action brought by defendant. Therefore the evidence is wholly insufficient to justify the verdict and defendant is entitled to a new trial.

Upon the facts disclosed by the record we do not find any merit in the several other assignments made by counsel.

The cause is remanded to the district court, with directions to grant a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE PIGOTT did not hear the argument, and takes no part in the foregoing decision.

## BABCOCK ET AL., APPELLANTS, v. GREGG, RESPONDENT.

(No. 3,953.)

(Submitted September 20, 1918. Decided November 25, 1918.)

[178 Pac. 284.]

*Real Property—Ditches—Easements—License—Prescription—  
Injunction—Pleading—Surplusage—New Trial—Appeal—  
Review of Evidence.***Real Property—Easement—Ditches—Prescription—Nature of Title.**

1. A right acquired by prescription to maintain a ditch over property of another is no more subject to variation than one created by deed, and therefore does not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over the land.

**Same—Easement—Abandonment.**

2. An easement for a right of way for an irrigating ditch may be lost by abandonment.

**Same—Easement—Nature of Right Acquired.**

3. An easement implies a permanent interest in real estate, and, generally speaking, can be created only by an instrument in writing or by prescription.

**Same—License—Definition.**

4. A license does not imply an interest in real estate, is a mere personal privilege which, so long as it is executory, may be revoked at the will of the licensor, and may rest in parol.

**Same—Easements—Exchange by Parol Agreement—Nature of Transaction.**

5. Where an easement for a ditch used to irrigate a large tract of land, after acquisition by prescription over town lots was abandoned by parol agreement of the parties for one over the same property but more advantageous to the lot owner, which agreement was fully executed, the transaction *held* to have been an exchange of one easement for the other, and not to have resulted in a license, revocable at the will of the licensor.

**Same—Ditches—Interference—Injunction—Title—Complaint—Surplusage.**

6. In a suit for an injunction to restrain interference with an irrigating ditch and to compel removal of an obstruction placed therein by defendant, plaintiff need not plead the character of title by which he holds the right of way for his ditch; where he does so, the allegation may be treated as surplusage.

[As to right of one land owner to accelerate or diminish flow of water to or from the lands of another, see note in 85 Am. St. Rep. 707.]

**Same—Pleading—Surplusage—Appeal—Theory of Case.**

7. Plaintiff's allegation that he acquired title to a ditch by prescription having been surplusage, he was not estopped, on the ground of inconsistency, to assert on appeal that he obtained title by exchange of one ditch for another.

**Equity—Findings—New Trial—Review of Evidence.**

8. The question of the sufficiency of the evidence to support the findings of the court in a suit for an injunction may be raised on appeal from the order denying a new trial.

*Appeal from District Court, Musselshell County; Chas. L. Crum, Judge.*

ACTION by Ida Babcock and others against J. B. Gregg. From a judgment for plaintiff and an order denying them a new trial, plaintiffs appeal. Reversed and remanded.

Mr. E. K. Cheadle, for Appellants, submitted a brief, and argued the cause orally.

Messrs. Collins, Campbell & Wood, for Respondent, submitted a brief.

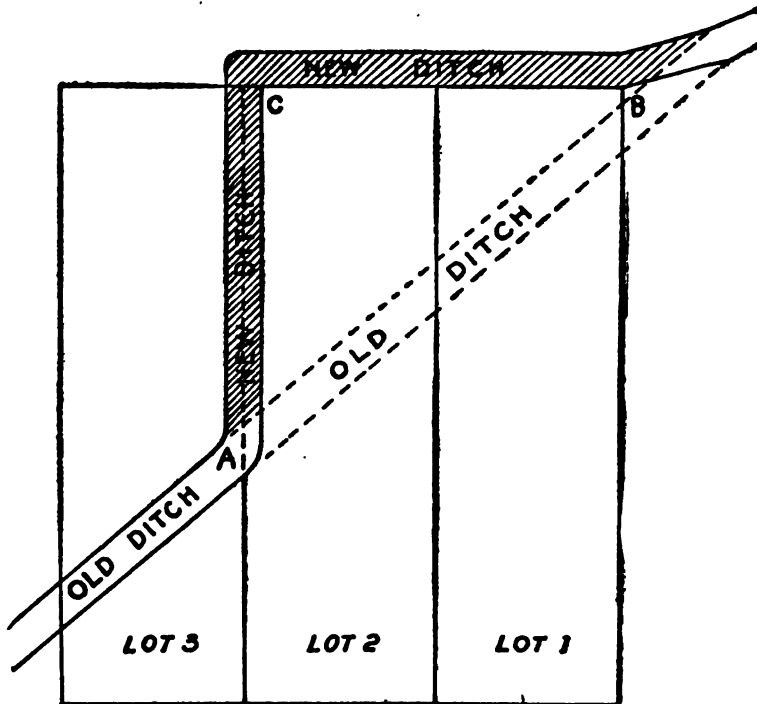
It is settled law that in 1910, and immediately prior to the ditch change, the appellants, in so far as lots 1 and 2, block 4, Ryegate, are concerned, had title only to the portions thereof actually then traversed by their ditch. (*State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Pope v. Alexander*, 36 Mont. 82, 92 Pac. 203, 565.) It is likewise settled law that an easement which has vested in the dominant estate cannot be changed after it has been established by prescription or otherwise, except by the creation of a new easement. (*Vestal v. Young*, 147 Cal. 715, 721, 82 Pac. 381, 384; *Kern Island Irr. Co. v. City of Bakersfield*, 151 Cal. 403, 90 Pac. 1052; 9 R. C. L. 793.) "Where an easement is acquired by prescription, the extent of the right is fixed and determined by the user in which it originated, and cannot be extended except by a user which has been acquiesced in for the requisite length of time, or where additional rights have been acquired by some other title." (14 Cyc. 1200, 1201; Kinney on Irrigation and Water Rights, 2d ed., pp. 1511, 1512, 1754, 1755; Angell on Watercourses, 7th ed., par. 224.)

The right acquired by the appellants was nothing more than a parol license, which became revocable at will. (*Great Falls Water Works Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963; *Archer v. Chicago, M. & St. P. Ry. Co.*, 41 Mont. 56, 137 Am. St. Rep. 692, 108 Pac. 571; *Lewis v. Patton*, 42 Mont. 528, 113 Pac. 745.)



MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiffs own approximately 1,500 acres of farm lands in Musselshell county, have appropriations of water for the irrigation of the same and a main ditch and laterals for distribution. In May, 1910, they had acquired by prescription a right of way for the main ditch over a portion of land which was platted as the town site of Ryegate. The ditch crossed diagonally lots 1 and 2 in block 4, which lots, so far as material here, are owned by the defendant. This suit was instituted to secure an injunction restraining defendant from interfering with the ditch and to compel him to remove an obstruction from it.



The complaint charges that in July, 1915, defendant constructed a foundation wall for a building, projecting into the ditch at point C on the diagram, thereby obstructing the flow

of water to plaintiff's land. The answer consists of a general denial of all the material allegations of the complaint, and an equitable counterclaim in the nature of a complaint to quiet title. The trial of the cause resulted in a judgment for defendant, and plaintiffs appealed from the judgment and from an order denying them a new trial.

The record discloses that the Milwaukee Land Company was the immediate predecessor of plaintiffs; that it owned the town site; that about 1909 it sold lots 1 and 2 to Mrs. Gregg and that she in turn sold them to defendant J. B. Gregg about 1913. In 1910 the location of a portion of the main ditch was changed so that it pursued the course illustrated by the diagram, instead of crossing lots 1 and 2 diagonally as theretofore.

The trial court found:

(2) That in May, 1910, plaintiffs had a right of way for their main ditch diagonally across lots 1 and 2.

(3) That thereafter in the same year the old ditch from A to B was filled; the course of the ditch changed materially and the right of way for the portion filled, was abandoned.

(6) "That no grant of easement for a right of way of any estate or interest whatsoever has ever been made to the plaintiffs herein, or to any of their predecessors in interest, of any portion of either lot 1 or lot 2 of block 4 of the original town site of Ryegate, either in writing or by parol, by the defendant or any of his predecessors in interest."

The other findings are not material to a determination of these appeals.

The court concluded that plaintiffs have no right to maintain their ditch over any portion of lot 1 or lot 2, and this conclusion follows if findings 3 and 6 are supported by the evidence.

It is elementary that plaintiffs' right to maintain their ditch [1] diagonally across lots 1 and 2, acquired as it was by prescription, did not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over defendant's property, for a right by prescription is no more subject to variation than one created by deed. (9 B. C. L. 793.) In this

instance the extent of the servitude was determined by the nature of the enjoyment by which it was acquired. (Sec. 4512, Rev. Codes.)

It is also elementary that an easement may be lost by abandonment; and if it is a fact that the portion of the old ditch from A to B was abandoned and a right of way for the new ditch was not acquired, plaintiffs are remediless so far as this action is concerned. The determination of the controversy, therefore, depends upon the answer to the inquiry: Does the evidence support findings 3 and 6?

It may be conceded that there is ample evidence to warrant the finding that the right of way from A to B was abandoned in the sense that the old ditch between those points was completely filled; that it was not thereafter used, and that no complaint is made of the action of the defendant in filling it. There is no specific finding that the new ditch was constructed upon lot 2, but, since finding 6 would be meaningless upon any other theory, we assume that it was meant by finding No. 5 to declare that it was constructed upon lot 2, to some extent at least.

The court failed to find upon the material question: Under what arrangement or agreement, if any, was the change made? The answer to this will determine whether the court erred in its finding No. 6.

The evidence seems to point conclusively to the fact that though Mrs. Gregg was nominally the owner of lots 1 and 2 when the change was effected, the defendant J. B. Gregg was actually the owner, but this is not very material. The old ditch was filled and the new one constructed over a portion of lot 2 under an agreement between defendant and the Milwaukee Land Company—the then owner of the old ditch and right of way. The change was made at the instance and request of defendant in order to render available for building purposes a larger area of lots 1 and 2. We think it is established beyond controversy, also, that defendant was the only one who was or could be benefited by the change.

The record does not disclose the particular theory upon which the court proceeded in making its deductions from the facts, but it must have adopted one or the other of these two theories: First: That the defendant merely granted a license to construct the new ditch over lot 2; that the license was revocable at will, and that by projecting the building foundation into the ditch, the license was revoked; or, second: That if defendant agreed to grant the right of way for the new ditch in consideration of the abandonment of the old one, such agreement resting, as it did, in parol, was void under the statute of frauds.

A text-writer has well said: "An easement is distinguished from a license, though it is often difficult to make out whether a particular case is the one or the other." (Jones on Easements, sec. 65.) An easement implies an interest in real estate; a license does not. Permanency is a characteristic of an easement, while a license, at least so long as it is executory, is a mere personal privilege, revocable at the will of the licensor. Speaking generally, an easement can be created only by an instrument in writing or by prescription (*Great Falls W. W. Co. v. Great Northern Ry. Co.*, 21 Mont. 487, 54 Pac. 963), while a license may rest in parol.

In this instance, the intention of the parties in making the [5] change is the determining factor, and that intention must be ascertained from their acts and declarations viewed in the light of the surrounding circumstances. It is apparent that when the change was in contemplation, defendant appreciated the character of servitude imposed upon lots 1 and 2 by the right of way for the old ditch. The title to that easement, though acquired by prescription, was as effective as though it had been evidenced by deed. (Sec. 4571, Rev. Codes.) The abandonment of the old way without acquiring a new one meant the abandonment of the entire irrigation system below lots 1 and 2. In view of these considerations, defendant agreed that the ditch should be removed from its diagonal course across those lots to the new location along the outer edge of lot 2—a location much more advantageous to him, but not advantageous

to anyone else. Under these circumstances it would be unconscionable to hold, in the absence of clear and convincing proof, that the parties intended that the valuable right represented by the old easement, should be surrendered altogether, and that the right of way for the new ditch over lot 2 might be destroyed at any time at the will of defendant.

The evidence does not justify finding 6, if made upon the theory that a revocable license only was contemplated. On the contrary, it indicates to us, clearly, that the transaction was intended to be, and in fact was, an exchange of one easement for the other—a grant of the right of way for the new ditch over lot 2, in consideration of the abandonment of the old one, and since the agreement was fully executed, the objection that it rested in parol is not available.

Section 5017, Revised Codes, was intended to prevent frauds, not to encourage their perpetration. In *Lewis v. Patton*, 42 Mont. 528, 113 Pac. 745, this court gave recognition to the principle now applied, and said: "It is a well-settled rule in equity that where A agrees orally to convey a right of way to B, and there is a sufficient consideration for such agreement, and, acting upon it, B enters into possession of the right of way and makes improvements to his financial detriment, equity will protect the right."

Finding No. 6 is not sustained by the evidence upon any theory, and without that finding there is nothing to support the judgment.

It was unnecessary to a statement of their cause of action for [6, 7] plaintiffs to disclose the character of title by which they held the right of way for their ditch, and the allegation of their complaint that they had acquired title by prescription may be treated as surplusage, and their contention now that they secured the new right of way by an exchange of the old one for it is not inconsistent with their pleading.

Counsel for respondent err in assuming that the question of [8] the sufficiency of the evidence cannot be raised upon ap-

on the implied *assumpsit*, the limitation of recovery being the stipulated price. There is no doubt as to the correctness of this theory. The course adopted by counsel has directly or impliedly been recognized as proper by this court in the following cases: *Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035; *Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241; *Cook & Woldson v. Gallatin R. Co.*, 28 Mont. 509, 73 Pac. 131; *McFarland v. Welch*, 48 Mont. 196, 136 Pac. 394; *Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.

That the special agreement was entire is obvious from the fact [5] that the consideration was entire, and that the defendant was not to become indebted to plaintiff until he had done the work, surrendered the contract, and given up possession of the land. To make out his case, therefore, plaintiff was bound to show that he had fully performed the agreement on his part; in other words, that, besides doing the work, he had surrendered the contract, and with it the possession of the land. (*Riddell v. Peck-Williamson H. & V. Co.* and *Waite v. Shoemaker*, *supra*.) Now, the evidence, as pointed out above, fails to show a surrender of the contract. So far as it tends to show anything in this regard, plaintiff retained possession of it and all the rights conferred by it. In addition to this, it is admitted by plaintiff in his reply that he remained in possession of the land until he was ousted by judgment in the action brought by defendant. Therefore the evidence is wholly insufficient to justify the verdict and defendant is entitled to a new trial.

Upon the facts disclosed by the record we do not find any merit in the several other assignments made by counsel.

The cause is remanded to the district court, with directions to grant a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE PIGOTT did not hear the argument, and takes no part in the foregoing decision.

**BABCOCK ET AL., APPELLANTS, v. GREGG, RESPONDENT.**

(No. 3,953.)

(Submitted September 20, 1918. Decided November 25, 1918.)

[178 Pac. 284.]

***Real Property—Ditches—Easements—License—Prescription—  
Injunction—Pleading—Surplusage—New Trial—Appeal—  
Review of Evidence.*****Real Property—Easement—Ditches—Prescription—Nature of Title.**

1. A right acquired by prescription to maintain a ditch over property of another is no more subject to variation than one created by deed, and therefore does not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over the land.

**Same—Easement—Abandonment.**

2. An easement for a right of way for an irrigating ditch may be lost by abandonment.

**Same—Easement—Nature of Right Acquired.**

3. An easement implies a permanent interest in real estate, and, generally speaking, can be created only by an instrument in writing or by prescription.

**Same—License—Definition.**

4. A license does not imply an interest in real estate, is a mere personal privilege which, so long as it is executory, may be revoked at the will of the licensor, and may rest in parol.

**Same—Easements—Exchange by Parol Agreement—Nature of Transaction.**

5. Where an easement for a ditch used to irrigate a large tract of land, after acquisition by prescription over town lots was abandoned by parol agreement of the parties for one over the same property but more advantageous to the lot owner, which agreement was fully executed, the transaction *held* to have been an exchange of one easement for the other, and not to have resulted in a license, revocable at the will of the licensor.

**Same—Ditches—Interference—Injunction—Title—Complaint—Surplusage.**

6. In a suit for an injunction to restrain interference with an irrigating ditch and to compel removal of an obstruction placed therein by defendant, plaintiff need not plead the character of title by which he holds the right of way for his ditch; where he does so, the allegation may be treated as surplusage.

[As to right of one land owner to accelerate or diminish flow of water to or from the lands of another, see note in 85 Am. St. Rep. 707.]

**Same—Pleading—Surplusage—Appeal—Theory of Case.**

7. Plaintiff's allegation that he acquired title to a ditch by prescription having been surplusage, he was not estopped, on the ground of inconsistency, to assert on appeal that he obtained title by exchange of one ditch for another.

**Equity—Findings—New Trial—Review of Evidence.**

8. The question of the sufficiency of the evidence to support the findings of the court in a suit for an injunction may be raised on appeal from the order denying a new trial.

entry to be made; the court can correct a judicial error in its judgment, but this can only be done through motion for a new trial or by appeal. (*Canadian etc. Trust Co. v. Clarita Land etc. Co.*, 140 Cal. 672, 74 Pac. 301.) In the case at bar it was not an attempt on the part of the court to correct a clerical misprision. The decree as entered was the decree intended by the court, but upon further consideration the court thought that a different decree should have been entered, and therefore purports on its own motion to vacate the original decree and set the matter for hearing anew. This cannot be done. (*In re Potter's Estate*, 141 Cal. 424, 75 Pac. 850.) A final decree distributing an estate cannot be changed or modified except by appeal. (*In re Garraud's Estate*, 36 Cal. 277.) The surrogate had no general revisory power on the ground that it erred as to the law or decided erroneously upon the facts, such revisory power being vested in the appellate court. (*Campbell v. Thatcher*, 54 Barb. (N. Y.) 382; *Harvey's Heirs v. Wait*, 10 Or. 117.) In the case at bar the action of the court was without due and legal notice or hearing. Until notice is given the court has no jurisdiction in any case to proceed to judgment. (*Younger v. Superior Court*, 136 Cal. 682, 69 Pac. 485; *McClatchy v. Superior Court*, 119 Cal. 413, 39 L. R. A. 691, 51 Pac. 696.)

The court cannot upon a change of mind alter or modify the judgment or vary the rights of the parties as fixed by the original decision. (23 Cyc. 868; 15 C. J. 975; *Bouldin v. Jennings*, 92 Ark. 299, 122 S. W. 639; *Karrick v. Wetmore*, 210 Mass. 578, 97 N. E. 92; *Heinitz v. Darmstadt*, 140 App. Div. 252, 125 N. Y. Supp. 109.)

"The authority of a court to amend its record is to make it speak the truth, but not to make it speak what it did not speak or ought to have spoken." (*Liddell v. Landau*, 87 Ark. 438, 112 S. W. 1085; *Tucker v. Hawkins*, 72 Ark. 21, 77 S. W. 902.)

*Mr. Jas. E. Murray*, for Respondents, argued the cause orally.



MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

*Certiorari* to the district court of Silver Bow county. On October 22, 1912, Sarah A. Pryor, a resident of Silver Bow county, was adjudged by the district court of that county to be incompetent, and by the same court the relator was appointed guardian of her person and estate. Having qualified as provided by law, the relator entered upon a discharge of his duties and continued therein under the direction of the court until the death of his ward, which occurred on December 7, 1917. She left a will executed on June 8, 1908, in which the relator was named executor. On January 12, 1918, the will was admitted to probate, and the relator was appointed executor and assumed the discharge of his duties as such. On May 18, 1918, the relator presented for settlement his final report and account in the guardianship proceeding. The court set it for hearing on June 1. The hearing having been continued from time to time, was finally had on July 12, and resulted in a final decree approving and settling the account and directing the relator to assume possession and control of the estate as executor. On September 10 the court made and entered an order setting aside the decree and directing the matter of settlement of the account to be reopened and placed on the calendar to be set for hearing at some future time. Thereupon the relator instituted this proceeding to have the order annulled as in excess of jurisdiction.

It does not appear, from the certified copy of the record returned in obedience to the writ, on what ground the district court set aside the decree of settlement. Nor does it appear that this action was had in response to a motion by anyone or that the relator had notice or was present. Apparently the court set aside the decree on its own motion.

In his general report of the condition of the estate accompanying the account, the guardian set forth a schedule of the property remaining in his hands, which consisted of a small sum in cash and undivided interests in six mining claims situate in

Silver Bow county, which in the original appraisalment of the ward's estate were valued in the aggregate at \$96,250; the report reciting that the guardian had executed a lease of these interests subject to the approval of the court, by the terms of which one Tinkler, a resident of Silver Bow county, had been given an option to purchase said interests for the sum of \$75,000, the payments to be made in installments as therein provided, in case Tinkler concluded to exercise his option. He also set forth that he had incurred an indebtedness to the authorities of the St. James Hospital in Butte for the care and maintenance of his ward, for \$4,276.35.

Counsel who appeared for the court state in their brief that the decree of settlement was set aside because the court, after further consideration of it, was of the opinion that in approving the account and accompanying report it had approved the option lease and adjudged the indebtedness incurred by the guardian as a just claim against the ward's estate, and hence had to this extent exceeded its jurisdiction in making the decree of settlement. This court is not now concerned with the inquiry what consideration moved the court in setting aside the decree, because there is nothing in the record to which we may look to ascertain the theory upon which it proceeded. We shall therefore consider and determine the single question before us, viz.: Did the court exceed its jurisdiction in setting aside the decree?

It will be noted that the decree of settlement was in a matter over which the court had jurisdiction (Rev. Codes, sec. 7775); therefore, though it may be conceded to have been in some respects erroneous in that it determined matters foreign to what was then before the court, it was not void for that reason. It is true, upon proper application by a party vested with an interest in the estate, the decree of settlement may have been sub-[1, 2] ject to amendment. Courts have the power to amend their judgments to the end that they will express what the court actually decided. This may be done at any time. When the clerk has failed to enter the judgment as pronounced, the court has the power to correct the misprision. (*Power & Bro. v.*

*Turner*, 37 Mont. 521, 97 Pac. 950.) But errors into which the court itself falls are judicial errors and cannot be corrected except by the method pointed out by the provision of the statute on the subject, that is, through a motion for a new trial, if such a motion is applicable in the particular proceeding, or on appeal; in other words, the court cannot upon a change of mind, after having rendered a judgment determining the rights of the parties, set aside such a judgment or modify it so as to alter or change the rights fixed by it as originally made. (*Whitbeck v. Railway Cos.*, 21 Mont. 102, 52 Pac. 1098; *Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920; *Finlen v. Heinze*, 28 Mont. 548, 73 Pac. 123.) On this subject, Mr. Freeman, in his work on Judgments, says: "The failure of the court to render judgment according to law must not be treated as a clerical misprision. Where there is nothing to show that the judgment entered is not the judgment ordered by the court, it cannot be amended. On the one hand, it is certain that proceedings for the amendment of judgments ought never to be permitted to become revisory or appellate in their nature; ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even although the proposed amendment embraces matter which ought clearly to have been so pronounced." (1 Freeman on Judgments, sec. 70, p. 94.) When the judgment is once rendered, the court loses jurisdiction over the subject matter, other than to see that the proper entry is made by the clerk and that the rights determined and fixed by it are properly enforced.

Decrees in probate proceedings are not, technically speaking, [4] judgments. (*Estate of Tuohy*, 23 Mont. 305, 58 Pac. 722.) But the mode of review applicable to judgments is by the statute made applicable to many of them (Rev. Codes, secs. 7096-7098), and a trial court has no greater power over these than it has over formal judgments.

We express no opinion at this time upon the question whether the order complained of is or is not in any respect subject to

amendment. This question is not before us. We leave it to be determined by the trial court upon a proper application to it.

The court was without jurisdiction to set aside the decree, and its order in this behalf is therefore annulled.

MR. JUSTICE HOLLOWAY concurs.

MR. JUSTICE PIGOTT did not hear the argument and takes no part in the foregoing decision.

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STATE EX REL. WESTERN ACCIDENT & INDEMNITY  
CO., RELATOR, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,314.)

(Submitted November 25, 1918. Decided December 2, 1918.)

[176 Pac. 613.]

*Supervisory Control—Change of Venue—Insurance—Contracts  
—Place of Performance—Burden of Proof—Payment—Evi-  
dence—Conclusions.*

Contracts—Payment—Statute.

1. Where a contract is silent as to the place of payment, the law imports into and makes a part of it by implication a provision that the debtor must, in order to perform his obligation, pay or tender payment to the creditor where the latter may then reside or conduct business or be found. (Rev. Codes, secs. 4932, 4933.)

Same—Venue—Residence.

1a. The residence of plaintiff at the time it commenced suit against defendant surety company fixed the rights of the parties in respect of the place of trial in so far as residence was the controlling factor, its residence at any subsequent time being immaterial.

Contracts—Insurance—Place of Payment—Change of Venue.

2. *Held*, on supervisory control, under the rule above that where a contract of indemnity did not designate any specific place for payment in case of loss to the insured, defendant company was required to make payment at the place of business or residence of the insured, and that therefore the county wherein such place was situate was the place of trial of an action by the insured to recover for loss sustained, and a motion for change of venue to the county of defendant surety company's residence was properly denied.

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For authorities discussing the general rule that parol evidence is not admissible to vary, add to or alter a written contract, see note in 17 L. R. A. 270.

Same—Change of Venue—Domestic Corporations—Residence.

3. When the question arises in an action in which a domestic corporation is a party, whether or not a change of venue shall be had, the principal place of business of the corporation is its residence.

Same—Change of Venue—Burden of Proof.

4. The burden of showing that a place other than the residence of plaintiff was agreed upon as the place where payment should be made under a contract of indemnity, was upon defendant company on its motion for a change of venue to the county of its residence.

[As to change of venue, see note in 74 Am. Dec. 241.]

Change of Venue—Affidavits—Conclusions.

5. Statements in affidavits filed by defendant indemnity company in support of its motion for a change of venue, to the effect that the contract of indemnity sued upon was to be performed by making payment at its home office, held legal conclusions and without evidentiary value.

APPLICATION for writ of supervisory control by the State, on the relation of the Western Accident & Indemnity Company, against the District Court of the Seventh Judicial District in and for the County of Richland, and C. C. Hurley, Judge thereof. Proceeding dismissed.

Mr. O. W. McConnell and Mr. F. J. Matoushek, for Relator, submitted a brief; Mr. McConnell argued the cause orally.

Messrs. Walsh, Nolan & Scallon, for Respondents, submitted a brief; Mr. C. B. Nolan argued the cause orally.

MR. JUSTICE PIGOTT delivered the opinion of the court.

This proceeding is an application for the writ of supervisory control. Relator is the defendant in the action of *Equity Co-operative Association v. Western Accident & Indemnity Company, a Corporation*, which was brought and is pending in the district court of Richland county. The relief sought is the annulment of an order of respondents' court and judge denying the defendant's demand for a change of venue from Richland county to Lewis and Clark county, and a direction to respondents to enter an order changing the place of trial to Lewis and Clark county.

The sole ultimate question involved is: Was the contract upon which the action is founded to be performed in Richland county or in Lewis and Clark county? If it was to be performed in

the former county, the relator is not entitled to any relief; if it was to be performed in the latter county, the relief must be granted.

The petition in support of the application for the writ exhibits, in substance, these facts: The complaint in the action states that the plaintiff is and at all the times mentioned therein has been a corporation of Montana and engaged in business at Enid, Richland county; that the defendant—relator in this proceeding—at all such times has been and now is a corporation of Montana engaged in the business of bonding and indemnifying against loss, with its principal office and place of business at Helena, Montana; that the defendant, therein called the surety, made a contract with the plaintiff, therein called the employer, by which it covenanted that if the plaintiff should suffer pecuniary loss by certain wrongful acts on the part of an employee named, the defendant would pay the plaintiff such loss not in excess of \$3,000,—“Provided, however: \* \* \*

2. That within ten days after the discovery of any loss, the employer shall have delivered notice thereof to the surety, at its home office in Helena, Montana. 3. That within ninety days after the discovery of such loss, the employer shall have delivered to the surety, at its home office in Helena, Montana, written claim stating the items and the dates of the losses. 4. That no suit, action or proceeding shall be brought against the surety by the employer within two months after the delivery of such statement of claim, \* \* \* ”; that during the life of the contract the plaintiff suffered such loss in the sum of \$10,263.-35; that plaintiff has complied with all the requirements and conditions of the contract on its part to be performed; and that none of the provisions of the contract has been altered or waived by the parties. Summons was served upon defendant at its home office and place of residence at Helena, in Lewis and Clark county. Defendant made timely demand for an order changing the place of trial from Richland county to Lewis and Clark county, basing it upon the papers and pleadings in the action and two affidavits, the latter averring, among other things not

here material, that the defendant's principal place of business has always been, and now is, in Lewis and Clark county; that the contract was made and was to be performed at Helena in that county; "that notice of the discovery of any loss by the plaintiff under said bond was required by the terms and conditions thereof to be given to the defendant at its home office in Helena, Montana. That the written claim by the plaintiff upon the defendant to be reimbursed for any loss is expressly required by the terms of said bond to be delivered to the defendant at its home office, in Helena, Montana. That any claim that would be paid under said bond would be paid through the home office of the defendant company in the city of Helena, Montana. That the contract herein sued upon was to be performed at the city of Helena, in the county of Lewis and Clark, state of Montana, and not in the county of Richland, state of Montana"; that the articles of incorporation certify its principal place of business to be in Helena, Lewis and Clark county, and that the defendant is a resident of that county. In resisting the motion and demand for the change of venue the plaintiff showed by affidavit that its principal place of business and office was at Enid, in Richland county. The respondents denied the demand and retained the action for trial in Richland county, and thereupon the present proceeding was commenced in this court. An order to show cause why the writ of supervisory control should not issue was made, which respondents move to quash upon the ground that the petition is insufficient to entitle the relator to relief.

Upon the showing thus made, relator contends that under the provisions of section 6504 of the Revised Codes, as interpreted by this court in *State ex rel. Interstate Lumber Co. v. District Court*, 54 Mont. 602, 172 Pac. 1030, the demand for change of venue should have been granted. It is argued that the contract was to be performed in Lewis and Clark county. The case cited is to the effect that an action upon a contract, whether it be express or implied, or in part express and in part implied, must, upon demand of the defendant, be tried in the

county in which the contract was to be performed, subject only to the power of the court to change the venue for one or more of the reasons enumerated in divisions 2, 3 and 4 of section 6506 of the Revised Codes; and further, that for breach of a contract to pay money, the county in which the contract was to be performed is the county in which the money was to be paid; and it was held, also, that since a plaintiff is entitled to bring his action in the county where the contract was to be performed, he may, if the place of performance does not appear from the complaint, defeat the defendant's demand for change of venue to the latter's residence by affidavit disclosing that the contract was to be performed in the county where the action was begun.

1. Relator insists that the contract upon its face shows that [2] the payment to the plaintiff for which the defendant covenanted must, when due, be made at Lewis and Clark county, pointing to the admitted facts that the defendant's home office, as well as its principal place of business, always has been and is in that county, that the contract was made and delivered there, and that both the notice and claim of loss are required to be made there, and also to the provisos. But these facts as to residence and place of business do not of themselves show, or raise a presumption, that it was the intention to perform the contract by payment in that county. Nor do the provisos, as a whole, evidence such intention. They are for the benefit of the defendant and for its protection, and have nothing whatever to do with appointing a place at which payment shall be made in event of loss. Compliance by the plaintiff with the requirements of provisos 2 and 3 is a condition necessary to the creation of any actual liability or debt, though the relation of debtor and creditor may be said to have had a potential existence at least from the day of the loss, if not, indeed, from the delivery of the contract; yet such compliance did not make the debt or liability due or then instantly payable, for proviso 4 postpones the accrual of any right of action by the plaintiff for the period of two months after it shall have complied with the stipulations of provisos 2 and 3, thereby granting to the defendant a space



of time during which it might rightfully refuse payment. So it should seem to be clear that the plaintiff's compliance with the second and third provisos—that is, by delivering the notice and the claim to defendant at Lewis and Clark county—could not have made the money then and there immediately due, whatever might have been the effect in that respect without the presence of the fourth proviso,—were that proviso eliminated, application of the familiar rule declared in section 5046 of the Revised Codes that if no time is specified for the performance of an act required to be performed and such “act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained,” might perhaps make Lewis and Clark county the place where payment was to be made. In essence the contract is that if the plaintiff should sustain loss and within the times limited deliver notice and claim thereof to the defendant at its home office in Lewis and Clark county, the defendant will, at the end of two months after delivery of the claim, and not before, become immediately liable, or, to describe the condition more accurately, the plaintiff will have the right at the end of the two months, but not before, lawfully to demand and proceed to enforce its right to payment. In short, the defendant's breach was intended to be, and consisted in, its failure to pay at the end of the two months, and until that time the defendant had not broken its covenant. The contract does not, therefore, either expressly or by inference indicate or designate Lewis and Clark county as the place where payment was to be made in case of loss. Nor does the contract indicate that Richland county was intended to be such place, for the words “Equity Co-operative Association of Enid, Montana,” while sufficient to indicate that the plaintiff then resided at Enid, do not show or imply that the plaintiff would be a resident of, or within, that county at the time when payment was to be made upon breach by the defendant of its covenant. So neither Lewis and Clark

county nor Richland county is designated by the contract as the place in which it was to be performed.

Broadly speaking, the rule is that if no place for payment be [1] specified or agreed upon, the debtor must, in order to perform his obligation, pay or tender payment to the creditor where the latter may then reside or conduct business or be found. Such was the holding in *State ex rel. Coburn v. District Court*, 41 Mont. 84, 86, 108 Pac. 144. The statute law of this state on that subject, appearing in sections 4932 and 4933 of the Revised Codes, states the rule more comprehensively and with greater particularity: "Sec. 4932. An offer of performance must be made to the creditor \* \* \* , if such creditor \* \* \* is present at the place where the offer may be made; and, if not, wherever the creditor may be found. Sec. 4933. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor: 1. At any place appointed by the creditor; or, 2. Wherever the person to whom the offer ought to be made can be found; or, 3. If such person cannot, with reasonable diligence, be found within the state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can with reasonable diligence, be found within the state; or, 4. If this cannot be done, then at any place within this state."

The doctrine rests upon the presumption or implication of law that the intention of the parties was that payment should be made to the creditor at his place of business, or residence, or wherever found, it being the duty of the debtor to seek the creditor. The implication is imported by the law into, and is part of, the contract. Said this court in the *Coburn Case*, *supra*: "If at the time this contract of employment was entered into there was not any place of payment mentioned, the parties will be held to have intended that the contract should be construed in view of the rule of law above, and what was actually intended becomes as much part of the agreement as any express provision, if there is not anything in the contract inconsistent

therewith"; and Mr. Chief Justice Kent, in *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332, declared that "where the operation of a contract is clearly settled by general principles of law, it is taken to be the true sense of the contracting parties." As illustrating the scope of the rule and its effect, we may remark that the principle forbidding the reception of prior or contemporaneous oral promises or agreements which would vary or add to or subtract from the express terms of a contract reduced to writing, is applicable to oral promises or agreements which would vary the legal construction or import of such a contract although not in contradiction of its express terms. (*Riddell v. Peck-Williamson H. & V. Co.*, 27 Mont. 44, 69 Pac. 241.)

As we have already said, the contract does not designate any specific place for payment, but does provide by implication of law that such payment shall be made to the plaintiff at its place of business or residence or wherever it may be found, and although such place is not specifically designated, it can be made certain by evidence. When such place shall have been ascertained, the county where the contract was to be performed will thereby be designated as such place, for that is certain which can be made certain.

2. Relator's next contention is that the showing on the demand for change of venue was sufficient to prove that payment was to be made at Lewis and Clark county. For several reasons this is untenable. It is to be observed that the demand for change of venue was based upon the papers and pleadings in the action, as well as upon the two affidavits. Now, the complaint, which was duly verified and therefore also an affidavit, states that at the time the action was commenced the plaintiff was a corporation of Montana engaged in business at Enid, in [1a] Richland county. The residence of the plaintiff at that time fixed the rights of the parties in respect of the place of trial in so far as residence was the controlling element or factor; the plaintiff's residence at any subsequent time could not be of [3] moment. When the question arises as to whether or not

a change of venue shall be had, the principal place of business of a domestic corporation is its residence. Again, the complaint alleges that none of the provisions in the contract has been altered or waived, and while this is without value as a pleading because no part of the plaintiff's statement of its cause of action, being in attempted denial of an anticipated defense, it was competent, as evidence by way of affidavit, in opposition to the demand for the change, because it affirmed that the contract as reduced to writing, including the implied provision touching the place where payment was to be made, had not been changed or waived; but if this averment should be considered as the statement of the opinion of the affiant, we may remark in passing that it would be at least of as much evidentiary value as the naked statements in the affidavits on behalf of the defendant—assuming them to possess any probative effect at all—that the contract was to be performed in Lewis and Clark county, and, if the view be taken that the opposing averments are of equal value, the one is a setoff to the other two.

Since in legal effect the contract stipulates that payment was to be made at the place of residence or business of the plaintiff, or wherever it might be found within the state, the complaint of itself, or it and the affidavit, thus identified Richland county as that place, unless the contrary was made to appear.

The burden was, of course, upon the defendant to show that [4] a place other than the residence of the plaintiff was agreed upon as the place where payment should be made (*King v. Ruckman*, 20 N. J. Eq. 316). The affidavits which were in [5] tended to prove this supposed fact do not deny that the plaintiff's residence was in Richland county when the action was begun, but contain the statements, as has been noted, that the contract was to be performed by making payment at its home office in Lewis and Clark county. This bald assertion seems, in view of its context, to be merely an expression of opinion by the affiants as to the legal construction or interpretation which should be placed upon the contract. In any event, however, such statements are sheer legal conclusions and were with-

out evidentiary value. If the contract has been so changed that Lewis and Clark county became the place in which payment was to be made, the burden rested upon the defendant to state the facts establishing the change. This it utterly failed to do.

The respondents committed no error in denying the demand for a change of venue. The order to show cause is discharged, the application denied, and the proceeding dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**AT THE**  
**DECEMBER TERM, 1918.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

THE HON. WILLIAM L. HOLLOWAY, }  
THE HON. WILLIAM T. PIGOTT, } Associate Justices.  
\*THE HON. CHARLES H. COOPER, }

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**STATE EX REL. LEASE, APPELLANT, v. WILKINSON, MAYOR,**  
**ET AL., RESPONDENTS.**

(No. 4,274.)

(Submitted December 3, 1918. Decided December 9, 1918.)

[177 Pac. 401.]

***Mandamus—Metropolitan Police Law—Police Officers—Wrongful Dismissal—Reinstatement—Affidavit—Sufficiency.***

***Mandamus—Demurrer—Motion to Quash—Admissions.***

1. A demurrer and motion to quash admit as true the allegations of the affidavit upon which an application for writ of mandate is based.

***Same—Police Officer—Wrongful Dismissal—Affidavit—Sufficiency.***

2. *Held*, that an affidavit setting forth that relator was a duly appointed, qualified and acting policeman of a city of the first class, dismissed from office without any charges having been made against him and without notice of trial, in violation of the Metropolitan Police Law, stated facts sufficient, if proved, to entitle relator to a writ of mandate to compel his reinstatement and therefore dismissal of the proceeding on demurrer and motion to quash was error.

[As to *mandamus* to restore officer wrongfully discharged, see note in 12 *Am. Dec.* 28.]

***Appeal from District Court of Missoula County; R. Lee McCulloch, Judge.***

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\* Elected November 5, 1918; qualified January 6, 1919.

*Mandamus* against H. T. Wilkinson, Mayor, and others, as commissioners of the City of Missoula, to compel reinstatement of relator as a policeman. From a judgment dismissing the proceeding, relator appeals. Reversed and remanded.

*Mr. Chas. A. Russell* and *Messrs. Madeen & Cameron*, for Appellant, submitted a brief; *Mr. Russell* argued the cause orally.

No appearance on behalf of Respondents.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In October, 1910, relator was duly appointed policeman of the city of Missoula,—a city of the first class,—qualified as such and performed the duties of his office until March, 1918, when he was discharged by the city commissioners, without trial and without notice that any charges had been preferred against him. He instituted this proceeding in *mandamus* to compel his reinstatement, and in his affidavit set forth the facts in detail. An alternative writ was issued and upon return respondents appeared by demurrer and motion to quash. The demurrer and motion were sustained and a judgment entered dismissing the proceeding, from which judgment relator appealed.

The minutes of the court recite: "In this matter it appearing to the court that the respondent is willing to accord relator a hearing by trial, it is therefore ordered that the motion to quash alternative writ of mandate heretofore argued, submitted and by the court taken under advisement is this day sustained." The record consists of the affidavit, the alternative writ, the demurrer, motion to quash, minute entry above, judgment and notice of appeal. The judge of the trial court certifies that this record, excepting the notice of appeal, "is a full, true and complete transcript of the record actually used by me as the basis of the order from which the appeal herein is now taken, and that the same contains all of the record and evidence heard and used by me in said action, and the foregoing is now by me hereby

settled, allowed and approved as a true and correct transcript of the record in said action."

It does not appear by what means the trial court was or could have been apprised of the fact that the respondents were willing to accord relator a hearing after this proceeding was instituted, but it is entirely immaterial. The wrong done to relator had occurred two months before this cause was heard in the lower court and was a continuing wrong.

The demurrer and motion to quash admit the allegations of [1] the affidavit to be true (*State ex rel. Fadness v. Eie*, 53 Mont. 138, 162 Pac. 164); so we have presented the case of a [2] duly appointed, qualified and acting policeman of a city of the first class, dismissed from office without any charges having been made against him and without notice of trial, in violation of the Metropolitan Police Law in force in, and obligatory upon, a city of this class. No defense of this action of the city commissioners is suggested. Indeed, they have not appeared in this court. The affidavit states facts sufficient, if proved, to entitle relator to the relief demanded.

The decisions in *State ex rel. McDonald v. Getchell*, 51 Mont. 323, 152 Pac. 480, and *State ex rel. Dwyer v. Duncan*, 49 Mont. 54, 140 Pac. 95, are controlling here; and upon the authority of those cases the judgment is reversed and the cause is remanded, with directions to overrule the demurrer and motion to quash.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE PIGOTT concur.



## STATE, RESPONDENT, v. TATE, APPELLANT.

(No. 4,208.)

(Submitted December 2, 1918. Decided December 9, 1918.)

[177 Pac. 243.]

*Criminal Law—Rape—Evidence—Sufficiency—Directed Verdict—Acquittal—Attorney and Client—Argument to Jury—Remarks of Court—Prejudicial Error—Bill of Exceptions—Settlement—Presumptions.*

**Bill of Exceptions—Settlement and Certification—Presumptions.**

1. Where the presumption of correctness arising from the settlement and certification of a bill of exceptions is not rebutted, it is conclusive.

**Rape—Evidence—Sufficiency.**

2. In a prosecution for rape, the uncorroborated direct testimony of the prosecutrix, if believed, establishes the guilt of defendant.

[As to evidence of complaint made by prosecutrix, see note in 38 *Am. Rep.* 369.]

**Same—Verdict of Acquittal—Refusal to Direct—When Proper.**

3. Refusal to direct a verdict of acquittal was proper where the evidence was sufficient, as matter of law, to prove every element necessary to constitute the crime of rape.

**Same—Directed Verdict of Acquittal—When Proper.**

4. Under Section 9297, Revised Codes, the district court may, in its discretion, advise, but not direct or compel, the jury to acquit if it deems the evidence to be clearly insufficient in weight to justify a verdict of guilty.

**Same—Attorney and Client—Trial—Argument to Jury—Duty of Attorney.**

5. It is the duty of counsel for defendant charged with crime to present the case of his client on argument in the light most favorable to the latter, and to that end to urge upon the jury all inferences from and interpretations of the evidence which are not palpably unwarranted, and so long as he does not misstate the testimony, his privilege in this respect is almost without limit.

**Same—Trial—Curtailling Argument to Jury—Prejudicial Error.**

6. Refusal of the court to permit defendant's counsel to comment in his argument to the jury upon statements touching a material fact made by the prosecutrix and her sister, which were contradictory of each other, was prejudicial error, entitling defendant to a new trial.

**Same—Trial—Evidence—Remarks by Court—Invading Province of Jury.**

7. Remarks of the trial judge during argument of defendant's counsel, to the effect that prosecutrix and her sister had not testified as to a certain material fact as counsel asserted they had, that no juror was in doubt about that, *etc.*, whereas such testimony had in fact been given, virtually resulted in a withdrawal of their statements from the jury and constituted prejudicial error.

*Appeal from District Court, Beaverhead County; Joseph C. Smith, Judge.*

D. E. TATE, convicted of the crime of rape, appeals from the judgment and from the order denying his motion for a new trial. Reversed and remanded.

*Mr. John Collins*, for Appellant, submitted a brief, and argued the cause orally.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent, submitted a brief, and argued the cause orally.

MR. JUSTICE PIGOTT delivered the opinion of the court.

Defendant, convicted of rape upon the prosecutrix, has appealed from the judgment of his conviction and from the order denying his motion for a new trial.

The attorney general objects to consideration, on appeal from the judgment, of the bill of exceptions for the reason that it was not presented or settled within the times prescribed by section 9340 of the Revised Codes; but the bill itself shows the [1] objection to be untenable. Moreover, from the judge's settlement and certification of the bill arises the presumption that it was presented and settled in time, which presumption is conclusive where, as here, it is not rebutted. (*Murray v. Hauser*, 21 Mont. 120, 53 Pac. 99.) He objects, also, to consideration on its merits of the order denying a new trial for the reason that the order was entered before the bill of exceptions was settled and therefore prematurely; but since the only errors assigned which we shall examine are reviewable on the appeal from the judgment, neither the order nor the objection requires further notice.

In view of the fact that the judgment must be reversed and a new trial ordered, we do not decide whether the question of the sufficiency in the weight of the evidence to justify the verdict, as distinguished from sufficiency in law to support it, may properly be reviewed on appeal from the judgment.

1. The refusal of the court to grant defendant's prayer for a directed verdict is the first error assigned. The evidence was

[2] in irreconcilable conflict. None of the state's witnesses, except the prosecutrix, gave any direct evidence that defendant committed the crime charged,—they testified to circumstances corroboratory only of her testimony, which circumstances were insufficient to establish his guilt. Her testimony, however, was direct and, if believed, established his guilt, the law not requiring corroboration of the evidence of the prosecutrix [3] (*State v. Gaimos*, 53 Mont. 118, 162 Pac. 596). The evidence was sufficient as matter of law to prove every element necessary to constitute the crime, and hence the court did not err in refusing to direct a verdict of acquittal. We do not determine whether the court below should have advised the jury [4] to acquit. Section 9297 of the Revised Codes, providing in effect that if the court deems the evidence insufficient to warrant a conviction, it may advise, but not direct or compel, the jury to acquit, can be applicable only where the trial court deems the evidence which tends to prove—and which, if believed, would prove—every element necessary to constitute the crime, to be clearly insufficient in weight to justify a verdict of guilt. (*State v. Welch*, 22 Mont. 92, 55 Pac. 927; *State v. Mahoney*, 24 Mont. 281, 61 Pac. 647.) This section seems to lodge discretionary power in the trial court, and, since a new trial may result from reversal of the judgment, we do not express an opinion in respect of how that discretion should have been exercised had defendant appealed to it.

2. As has been stated, the evidence was irreconcilable. Certain facts, however, appeared about which no controversy existed or could exist. It was clearly shown that if defendant raped the prosecutrix, he did so in her father's house during a night when he and one Squires were occupying the same bed; and that unless the crime charged was committed on the night of September 30—October 1, it never was committed. Defendant swore that he shared the bed with Squires but once and then on the night of September 29–30, and that he spent the entire night of September 30—October 1 in a house five miles distant from her father's house, the testimony of other wit-

nesses tending to corroborate the latter item of evidence. Squires testified that he and defendant shared the bed on both nights. The prosecutrix and her sister stated in certain parts of their testimony that defendant and Squires occupied the same bed on the two nights, and in other parts of their testimony made statements from which the inference was permissible that these men shared the same bed only on the one night,—for instance, the prosecutrix testified: "Tate and Squires slept together only one night; that was the 29th and part of the 30th, —night of the 30th," and if by this she meant the night of September 29–30, she contradicted herself and fixed a time which exonerated defendant; if by this she meant the night of September 30—October 1, she flatly contradicted parts of her other testimony and parts of her sister's and Squires' testimony; each of them had repeatedly said that defendant and Squires occupied the same bed on the two nights, each distinctly and circumstantially testifying that the two men occupied the same bed on these two nights. Her sister afterward swore: "I do not know exactly how many nights Mr. Squires and Mr. Tate slept together, I don't remember. As to whether it was two nights, I do not remember anything about that. As near as I remember all I do know about that [is] that one night [September 30—October 1]. That is as near as I know about that."

With the evidence in this condition, defendant's counsel during the course of his argument to the jury said in effect that the state had failed to comment upon the admission by the prosecutrix and her sister that defendant and Squires slept together but one night. He was interrupted by the county attorney's objection that the remark was not in harmony with a correct construction of the evidence, to which defendant's counsel answered by insisting that the construction was correct, asking that the record be read. The court held that the girl and her sister had not testified that defendant and Squires slept together on one night only, saying: "They did not confine it solely to one night; that is the record; we are not going to go

into that. The record is that the witnesses [the prosecutrix and her sister] testified that they [defendant and Squires] slept together two nights. \* \* \* This is not an interpretation on this evidence at all. If you [defendant's counsel] sat here throughout the trial of this case and allowed yourself to come to any such conclusion from the answers made, I cannot help it. I do not think there is any juror in doubt about that; let's not go on with it, the result is absolute, I think, on that. There is also this testimony, that on the morning after Squires got up and found the defendant on his bed, they got up and washed and went to breakfast. It is in the record twenty-five times as to the number of nights they slept together." Defendant excepted to the remarks of the court and to its action in sustaining the objection.

The court erred in requiring defendant's counsel to desist [5] from arguing to the jury that the prosecutrix and her sister had testified that defendant and Squires slept together but one night. The court erred also in making the remarks quoted. It was the duty of defendant's counsel to present the case in the light most favorable to the client and to that end to urge upon the jury all inferences from and interpretations of the evidence which were not palpably unwarranted. So long as counsel did not misstate the testimony, his privilege of drawing inferences and making comments was well-nigh without limit. He had the right by way of argument to tell the jury that the testimony of the prosecutrix and her sister showed a certain fact or that they admitted it, if the argument had any fair ground on which to rest even though the court or its judge should hold an opinion, or be convinced, to the contrary. The [6] testimony of the prosecutrix and her sister was such as fully to justify the argument by defendant's counsel to the effect that they admitted that defendant and Squires slept together [7] on the one night only. The issue of fact was raised whether they shared the same bed on one night only or on the two nights, and the testimony of these two witnesses was open to attack as being self-contradictory on that issue. Defendant

testified plainly and unequivocally that he occupied the bed only on the night of September 29-30, and he had the right to argue to the jury that his testimony in that respect was supported by the statements of the prosecutrix and her sister, and he had the right likewise to point out to the jury the conflict in the testimony of each of these witnesses as discrepancies. In telling the jury, or saying in their hearing, that these witnesses had not said that defendant and Squires occupied the bed on one night only but had testified that the men had slept together on the two nights, and that the judge did not think that any juror could be in doubt about that fact, the court inadvertently misstated material evidence and declared to the jury that certain inferences only could be drawn from such evidence despite the fact that inferences to the contrary might well have been deduced. The practical effect was to withdraw from the jury the testimony quoted. The question of fact as to what the conflicting evidence established was, of course, for the jury, not for the court or its judge, to find.

Since the ruling and remarks of the court in the particulars mentioned were prejudicially erroneous to defendant, the question whether, under the Constitution and statutes of Montana, the trial judge may express to the jury his own opinion of the weight of the evidence and comment upon the credibility of the witnesses, provided the jury be advised that they are not in any wise bound by such opinion or comment and must themselves find the facts from the evidence adduced, need not be considered and is reserved.

The judgment is reversed and a new trial ordered.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

## STATE, RESPONDENT, v. BROWER, APPELLANT.

(No. 4,277.)

(Submitted December 2, 1918. Decided December 16, 1918.)

[177 Pac. 241.]

*Criminal Law—Burglary—Circumstantial Evidence—Insufficiency.**Criminal Law—Evidence—Suspicion of Guilt Insufficient.*

1. Suspicion, however well founded, that defendant is guilty of the crime for the commission of which he is being tried, does not justify a conviction.

*Same—Circumstantial Evidence—Sufficiency—Rule.*

2. Where circumstantial evidence is relied on to convict of crime, the circumstances proved must be consistent with each other and so clearly justify the conclusions of guilt that they exclude any other rational hypothesis.

[As to circumstantial evidence, see notes in 62 Am. Dec. 179; 97 Am. St. Rep. 771.]

*Same—Burglary—Circumstantial Evidence—Insufficiency.*

3. Evidence, wholly circumstantial in character, held insufficient, under the above rules, to warrant defendant's conviction of the crime of burglary in the night-time.

*Appeal from District Court of Hill County; W. B. Rhoades, Judge.*

OVA BROWER, convicted of burglary in the first degree, appeals from the judgment of conviction and an order denying his motion for a new trial.

*Messrs. Donnelly & Carleton*, for Appellant, submitted an original brief and one in reply to that of the State; *Mr. Joseph P. Donnelly* argued the cause orally.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant was convicted by the district court of Hill county of burglary in the first degree and has appealed from

the judgment and an order denying him a new trial. Counsel assail the validity of the judgment on the ground that the evidence is insufficient to justify the verdict.

The evidence is entirely circumstantial. N. P. Daly resides on a farm owned by him near the village of Simpson, in the northern part of Hill county, within ten or twelve miles of the Canadian boundary. Some weeks prior to February 9 of this year, he left his place and went on a visit to the state of Iowa, intrusting the care of his stock, *etc.*, to Harry H. Smith, a neighbor who resided about three-fourths of a mile away. During the afternoon of February 9 Smith had been to Simpson. Upon returning home about 9 or 9:30 o'clock in the evening, he suspected, for some reason which he does not disclose in his testimony, that something was wrong at the Daly barn. He took his rifle and went over to investigate. As he drew near the barn he saw a flashlight, or a light from burning matches, in the barn. He also saw a strange team of work horses hitched to a sled standing in the barnyard. This team was afterward identified as belonging to the defendant. He shouted, whereupon he was fired upon eight or ten times from the doorway of the barn, the flashes being apparently from two guns about three feet apart. He fired three shots in return. The evening was dark and foggy. He did not see anyone in the barn, nor did he see anyone leave it. He could not say whether there was one or more persons in the barn. After he had fired the three shots, the fire from the barn suddenly ceased. He thereupon went and notified four neighbors who resided in the vicinity, the home of the nearest being about a mile away. When he and they reached the barn, which they did about 11 o'clock, they found a young man named Bennett Wynne lying dead in the barn near the door. Nothing was disturbed by anyone, Smith and the neighbors who were with him keeping watch until the arrival of the sheriff and coroner on the following afternoon, these officers having in the meantime been informed of what had occurred. From the testimony of Smith and the



several witnesses introduced by the state, we gather the following account of what was discovered on the next morning:

There was a wagon-box on the sled. In this were found nine sacks of wheat. Some of these sacks were marked with the name of the defendant. With them was a double set of harness. On the floor of the box was a lantern and a pair of mittens, the latter being partially covered with chaff. These mittens were identified as the property of Wynne. A second set of harness was found outside the barn near the door. Immediately inside the door was a third set of harness on which the body of Wynne was lying. Under the body was another pair of mittens; these were identified as belonging to the defendant. A 38-caliber revolver was found lying near the body, containing empty shells. On the body was a cartridge belt in which there was a single 38 cartridge. Outside of the door on the ground was found one 32 cartridge and one empty shell of the same caliber. The team hitched to the sled was recognized as belonging to the defendant. There was considerable snow on the ground. Early in the night this had thawed somewhat but later had frozen. The tracks made by the sled had come from the north. The person or persons driving the team had first passed a place a short distance north of the Daly place which is referred to by the witnesses as the McConville place. The team had been turned around in the road after passing this place and driven back to a granary belonging to the owner. This place was also unoccupied. The sacks found in the sled had apparently been filled with wheat from this granary before the team was driven to the Daly barn. The McConville place belonged to an uncle of Daly. When Daly left home for Iowa the granary at the McConville place contained a hundred bushels of seed wheat belonging to Daly, and about twenty bushels of flax. When Daly returned on February 12 all this had disappeared. He found that the wheat in the sacks on the sled was the same kind as that stored in the granary and that the sacks, other than those bearing defendant's name, were his, these having been taken from that granary. The tracks of two

persons were found at the granary, those of one of them being small. The defendant had small feet, smaller than the feet of the average man. Some of the witnesses observed the tracks of a man leading from the barn toward the northwest. These were followed by some of the witnesses as far as seventy rods from the barn to a road extending east and west, north of the Daly barn along the line of the section in which the Daly place and the McConville place are both located. These had been made by a man wearing overshoes which were comparatively new, as was apparent from the imprint in the snow of the corrugations on the soles. They could not be traced farther than this road. The person who had made them seemed to be trying to step into the tracks made by the horses hitched to the sled. No one of the witnesses was able to identify these tracks or would express an opinion as to when they were made. One witness said that he thought they were larger than tracks made by defendant's feet. The north and south road leading to the Daly place extends north to defendant's home, which lies about three miles a little west of north from the Daly place. At about 8 o'clock in the evening of February 9, one of the witnesses met the defendant and Wynne six or seven miles north of the Daly place. They were driving south toward defendant's home with a load of hay and a sled which had a second sled tied on behind it. The defendant volunteered the information that he had borrowed the second sled from one Heft, being under the impression in the dark that he was talking to Heft. The sled at Daly's barn was identified as the one defendant had borrowed from Heft. The several sets of harness found at the barn were left hanging in the barn by Daly when he went away, and belonged to him. Prior to February 9 Wynne had been staying at the home of defendant, working for him. He had also made arrangements with the defendant to work for him during the coming season. The witness Chrislock also stayed there up to February 8. While he was there it was common for the men there to wear each other's mittens. One would pick up the first pair he could find and use it. The defendant had a re-

volver, but the witness never examined the caliber of it, supposing it was a No. 38. Wynne had a 32 revolver.

The foregoing is a statement of every circumstance which tends to show that defendant was at the Daly barn on the evening in question. That Wynne was engaged in committing a larceny cannot be doubted. Evidently he had gone first to the McConville place to steal the wheat and then to the Daly barn [1] to obtain the harness by the same means. While many of the circumstances proven tend to incriminate the defendant also, when taken together they go no further than to raise a well-founded suspicion of his guilt. This is not sufficient to meet the requirements of the statute. (Rev. Codes, sec. 8028.) Suspicion, however well founded, does not justify a conviction. (*State v. McCarthy*, 36 Mont. 226, 92 Pac. 521; *State* [2] *v. Sieff*, 54 Mont. 165, 168 Pac. 524.) To justify a conclusion of guilt the criminatory circumstances proved must be consistent with each other, and so clearly justify that conclusion that they exclude any other rational hypothesis. (*State v. Suitor*, 43 Mont. 31, Ann. Cas. 1912C, 230, 114 Pac. 112; *State v. Chevigny*, 48 Mont. 382, 138 Pac. 257; *State v. Sieff*, *supra*; *State v. Woods*, 54 Mont. 193, 169 Pac. 39.) It is true that defendant's [3] team was found at the barn hitched to the sled he had that afternoon borrowed from Heft; that the tracks of two men were found at the McConville granary; that a pair of his mittens was found under the body of Wynne; that Wynne had theretofore been employed by him and lived at his home; that tracks of a man leaving the barn were found going in the direction of defendant's home; and that he had a revolver of the same caliber as that found at the barn. All of these circumstances point to the conclusion that he was at the barn with Wynne, and hence that he was engaged in the larceny with him. When it is recalled, however, that Smith was not able to say that there was more than one person there, that he saw no one leave there, that no one of the witnesses could tell when the tracks leading toward the north were made, that no one could identify them or was willing to say even that they were the

same size as those of defendant, and that it was common for the men in defendant's employ to wear his mittens, the conclusion that he was present is not so necessary as to render irrational the hypothesis that he was not there. The fact that the evidence tends to show that there were two men at the barn, taken together with all the facts proved, does not render necessary the conclusion that one of them was defendant. Therefore the evidence was not sufficient to justify the conviction. The case of the state was not in any way aided by the evidence introduced by the defendant. On the contrary, this evidence tended strongly to show that defendant was not only not present, but that he was at the time on his way to his father's home in Canada, ten or twelve miles north from his own home. But whether the testimony of himself and his witnesses was to be accepted as credible or not, as we have pointed out above, the evidence adduced by the state was not sufficient to justify the verdict.

It is urged by counsel that the evidence does not show that Daly was the owner of the barn, or that, assuming that defendant was there with Wynne, he did not have the right of entry to it. There is not any merit in this contention. The evidence in these particulars was not as definite as it might have been, but it was sufficient to go to the jury. On another trial the county attorney will doubtless be able to furnish ample evidence to remove any uncertainty in this behalf.

The judgment and order are reversed and the district court is ordered to grant defendant a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE PIGOTT concur.

STATE EX REL. HALL, APPELLANT, v. PETERSON ET AL.,  
RESPONDENTS.

(No. 4,271.)

(Submitted December 3, 1918. Decided December 16, 1918.)

[177 Pac. 245.]

*Schools and School Districts—Creation—Petition—Sufficiency—  
Appeal—Notice of Appeal—Filing—Board of County Com-  
missioners—Powers.*

**Schools and School Districts—Creation—Petition—Sufficiency.**

1. Petition for the creation of a new school district out of an existing one, under section 405, Chapter 76, Laws 1913, need not formally allege that the proposed new district is part of the one out of which it is sought to be created.

**Same.**

2. Failure of a petition of the nature of the above to recite that there was more than one schoolhouse in the district from which the new one was to be segregated, and that the petitioners resided within the confines of the latter, did not render it insufficient.

**Same—Petition—How to be Construed.**

3. A petition for the creation of a new school district under section 405, Chapter 76, Laws 1913, is not a pleading the contents of which are subject to critical legal analysis to determine its sufficiency; but is sufficient to confer jurisdiction upon the board of school trustees if it clearly indicates the desire of a majority of the school electors residing in the proposed new district for segregation, and describes its boundaries.

**Same—Notice of Appeal—Sufficiency.**

4. Since section 405, *supra*, does not require that the notice of appeal from the decision of the board of trustees to the county superintendent of schools, or from the decision of the superintendent to the board of county commissioners, shall state that appellants are resident taxpayers, absence of such allegation does not render the appeal ineffectual.

**Same—Residence of Petitioners—How determinable.**

5. The residence of school electors who appeal from a decision of the superintendent of schools in the matter of their petition for a new school district, if called in question, must be determined by proof, not by assertion to that effect in their petition.

**Same—Notice of Appeal—Failure to File—Effect.**

6. Section 405, Chapter 76, Laws 1913, does not provide for filing of the notice of appeal required of school electors who are dissatisfied with a ruling of a county superintendent in the matter of the creation of a new school district; hence failure to file such notice with the clerk of the district or with the school board did not render the appeal ineffectual.

**Same—Creation—Appeal.**

7. An appeal lies from the decision of the board of school trustees denying a petition for the creation of a new school district presented under section 405, Chapter 76, Laws 1913.

Same—Appeal—Power of Board of County Commissioners.

8. Upon appeal to it from a decision of the county superintendent of schools denying a petition for the creation of a new school district, asked for under section 405, Chapter 76, Laws 1913, the board of county commissioners is vested with plenary power to create the district.

*Appeal from District Court, Missoula County; R. Lee McCulloch, Judge.*

APPLICATION by the State on the relation of H. G. D. Hall for writ of *certiorari* to annul an order of the board of commissioners of Missoula County, creating a new school district out of District No. 28. From the judgment refusing the writ and dismissing the proceeding, relator appeals. Affirmed.

*Mr. Chas. A. Russell* and *Messrs. Madeen & Cameron*, for Appellant, submitted a brief; *Mr. Russell* argued the cause orally.

The petition was insufficient to confer jurisdiction on the board of school trustees of School District No. 28. If it is insufficient, the board never acquired jurisdiction, and it follows that neither the county superintendent nor the board of county commissioners acquired jurisdiction of the pretended appeal (See 35 Cyc. 834; *School Trustees, etc., v. People*, 71 Ill. 559; *Webb v. People*, 11 Ill. App. 358; *In re Mount Pleasant Township v. Independent School District*, 10 Pa. Mo. Ct. R. 588; *Stephens v. School District*, 104 Ark. 145, 148 S. W. 504; *School District No. 44 v. Turner*, 13 Okl. 71, 73 Pac. 952; *Dartmouth Sav. Bank v. School Districts Nos. 6 and 31*, 6 Dak. 332, 43 N. W. 822; *Trustees of Schools v. People*, 121 Ill. 552, 13 N. E. 526; *Whitmire v. State* (Tex. Civ.), 47 S. W. 293).

*Mr. Fred R. Angevine*, *Mr. Dwight N. Mason* and *Mr. L. C. Bolton*, for Respondents, submitted a brief; *Mr. Bolton* argued the cause orally.

MR. JUSTICE PIGOTT delivered the opinion of the court.

This is an appeal from a judgment denying a writ of *certiorari* and dismissing the proceeding in that behalf. It arises

out of the effort of certain persons to bring about a division of School District No. 28 in Missoula county. The statute under which the steps were taken is section 405 or Chapter 76 of the Session Laws of 1913, reading thus: "Whenever any school district has more than one schoolhouse, and the school electors residing in any particular portion of said district, in which portion there is a schoolhouse, desire a division of said district, they shall present a petition in writing to the board of trustees of said school district, signed by a majority of the school electors of that portion of said school district out of which they desire to create a new school district which petition shall describe the boundaries of the proposed new school district. The board of trustees of said district at any regular meeting or at any special meeting called for that purpose, may approve or deny the said petition in their discretion and shall enter their approval or denial upon the minutes of said meeting and transmit the original petition together with a certified copy of the minutes of said meeting to the county superintendent of schools. If the board of trustees of said school district shall approve of the division of said school district, and no appeal is taken from their decision as herein provided, the county superintendent of schools may thereupon make an order establishing such new district and defining its boundaries. Any three resident taxpayers of either the old or new district may within thirty days appeal from the decision of the said board of school trustees to the county superintendent of schools and may, within thirty days appeal from any decision or order made by the county superintendent of schools to the county commissioners whose decision shall be final."

The petition recited that the persons who signed it were a majority of the school electors and resident freeholders in the territory which they sought to have created into a new district; it described the boundaries of the proposed new district; it stated that there was then standing on the territory of the proposed new district a schoolhouse of sufficient size and well located in respect of the school population; and that the assessed

value of the property within the proposed new district was then over \$20,000 and on or before January 1, 1918, would exceed \$40,000; it stated that there were then living in that territory twenty-eight children of school age; and the petitioners prayed that the new district be created. The petition was presented to the board of trustees of School District No. 28, which on September 21, 1917, heard the petition and after investigation and consideration denied it on the merits. On October 8 following, sixteen persons, describing themselves as resident freeholders and electors of the territory embraced within the proposed new district, fourteen of whom had signed the petition, served on the board notice of their appeal from its decision to the county superintendent of schools, in whose office the notice was filed on October 24, 1917. The superintendent of schools considered the petition on its merits and denied it, and thereupon resident taxpayers to the number of fifteen, all, or at least a majority, of whom had signed the petition for the division and also the notice of appeal from the board of trustees of the school district to the county superintendent, gave notice to the superintendent of their appeal from her decision to the board of county commissioners of Missoula county, which board heard the appeal, trying the petition on its merits and taking evidence for that purpose. After investigation and consideration of all the facts, the board granted the petition and ordered that the proposed new district be created. Afterward it refused a rehearing. Upon these facts, which were disclosed by the record certified to the court below, the relator applied for the writ of *certiorari* to annul the order of the respondent board. Judgment was entered refusing the writ and dismissing the proceeding, and relator appeals.

The relator insists that the statutes under which the steps were taken for the creation of the new district are sections 404 and 405 of Chapter 76 of the Laws of 1913; but it is manifest that the petition was prepared and presented, and that all the proceedings were taken, under section 405.



The following are the chief contentions urged by relator for reversal:

1. That the facts set forth in the petition to the board [1] of school trustees were insufficient to clothe the board with jurisdiction, for the reason that the petition did not show that the territory sought to be created into a new district was any part of School District No. 28. Suffice it to say that the petition is addressed to the board of school trustees of District No. 28 in Missoula county, and describes by reference to section lines, as well as courses and distances, the boundaries of the proposed new district, and it was not necessary that the petition should state formally in set terms that the proposed new district was a part of District No. 28. The section does not prescribe that such a statement shall be made in the petition. Whether or not the territory sought to be set apart as a new district was part of District No. 28 presented a matter of fact; if not a part of District No. 28 the petition would, of course, be futile. The petition was addressed to and was to be acted upon by the board of school trustees of District No. 28, and it was for the board to ascertain whether the territory described constituted part of its district.

2. That the petition did not allege that there was more than [2] one schoolhouse in District No. 28, and did not allege that the petitioners resided in that district. But the petitioners alleged that they resided in the described territory which was sought to be segregated from District No. 28, and the board of school trustees knew, or could readily have ascertained, whether that territory was part of the school district. Nor was it necessary that the petition should have alleged that the district had more than one schoolhouse, for the statute does not require it to contain such statement. Whether there was more than one such house in that district presented a question of fact for the determination, in the first place, of the board of school trustees when it came to consider the petition.

The petition is not a pleading. Its sufficiency is not to be [3] tested by subjecting its contents to analysis by the trained

legal mind searching for, or bent on discovering, defects; nor are its averments to be construed against those who have signed it. Statutes such as the one here involved have been fashioned broadly and without regard to technical nicety, the purpose being to serve the vital interests of the public. It was not contemplated or purposed that such a statute should be taken into the closet and there subjected to critical scrutiny and microscopically minute examination in the hope or expectation of revealing occult meanings different from those fairly apparent from the language used and contrary to the general design of the law-making power. If the attacks here made upon the petition be sufficient to destroy its life, few, if any, petitions for the creation of a school district out of an existing district will ever serve any purpose unless competent lawyers be employed to draft them. The design and intent of the statute is that the board of school trustees of the district from which is sought to be carved a new district, shall be notified by the petition of a majority of the school electors residing in the proposed new district of their wish for segregation, and that when the petition clearly indicates such desire and describes the boundaries of the proposed new district, the board of school trustees shall thereby acquire jurisdiction to hear and determine the matter. In the present instance the petition was sufficient for the purpose of conferring jurisdiction upon the board.

3. That the attempted appeal from the decision of the board [4] of trustees to the county superintendent of schools was ineffectual and void for the reason that the appeal was not taken by resident taxpayers, and was not filed as required by law.

As to the contention that the appeal was not taken by taxpayers it is perhaps enough to say that the contention is not supported by the record, for the notice of appeal to the county superintendent of schools recites that the appellants are resident freeholders and school electors of that portion of the district sought to be segregated, and in the notice of appeal from the decision of the county superintendent of schools to the board of county commissioners those signing the notice of appeal describe

themselves as resident taxpayers of the district sought to be segregated, more than three of whom were among those signing the notice of appeal from the board of school trustees to the county superintendent of schools. It therefore appears upon the face of the record that both appeals were taken by persons who declared themselves to be resident taxpayers. But this is not of great moment, for the statute does not require in either [5] that the notice of appeal shall state that the appellants are resident taxpayers, for whether they be such or not is, if the issue be raised, a matter of proof, not of assertion. This seems to be clear, but the case of *Anderson v. County of Meeker*, 46 Minn. 237, 48 N. W. 1022, supports the conclusion announced.

While the appeal from the decision of the board of trustees [6] to the county superintendent of schools was taken within the thirty days prescribed by section 405, it does not appear whether or not the notice of appeal was filed either with the clerk of the district or with the board. It was, however, duly served upon the chairman of the board within the time allowed by law, and was filed with the county superintendent three days after the expiration of that time. The statute nowhere makes provision for the manner in which an appeal shall be taken, nor is there provision that the notice of appeal shall be filed. The purpose of the statute is to allow an appeal from the decision of the board to the county superintendent, and from him to the board of county commissioners, to the end that the petition may be heard,—if three or more taxpayers affected so desire,—by these tribunals and officer in the order mentioned, and that any notice of appeal served within thirty days which shall be sufficient to give information to the board or officer whose decision is appealed from of the fact that such appeal is taken, will be sufficient to perfect the appeal, whether or not the notice of appeal be filed within thirty days or filed at all.

4. That no appeal is provided for or lies from the decision [7] of the board of school trustees denying a petition presented under section 405. This contention is also without merit, for the statute provides that “any three resident taxpayers of

either the old or new district may within thirty days appeal from the decision of the said board of school trustees to the county superintendent of schools and may, within thirty days appeal from any decision or order made by the county superintendent of schools to the county commissioners whose decision shall be final"; so that an appeal does lie from such decision. The purpose of the section as to appeals is commented on in paragraph 4 of this opinion.

5. That the board of county commissioners has no power or [8] jurisdiction to create new school districts. But this denial of power is refuted by the section itself. Upon appeal under section 405 from the decision of the board of trustees to the county superintendent of schools, the latter does not act as a court or judge sitting for the review of errors, but takes the matter presented by the petition and tries it *de novo* upon the merits; the board of county commissioners in considering an appeal from the county superintendent of schools, likewise tries and determines the matter *de novo* upon the merits and not as a court or tribunal for the correction of errors; upon such appeal plenary power is thus vested in the board of county commissioners to create a new school district, and its decision is declared to be final. The sole question to be decided by each tribunal or officer is: "Shall the proposed new district be created?"

The board of trustees, the county superintendent of schools and the board of county commissioners, severally, having had jurisdiction of the petition for the creation of the proposed new school district, and not having exceeded such jurisdiction, the court below did not err in dismissing the proceeding. The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

## MATOOLE, RESPONDENT, v. SULLIVAN, APPELLANT.

(No. 3,957.)

(Submitted December 5, 1918. Decided December 16, 1918.)

[177 Pac. 254.]

*Assumpsit — Variance — Failure of Proof — Evidence of Value — Opinions — Appeal and Error — Conflict in Evidence — Affirmance.*

*Assumpsit—Pleading—Evidence—Variance—Failure of Proof.*

1. In an action to recover the reasonable value of services consisting of cooking, washing, etc., performed for defendant, and of groceries, supplies, fuel, etc., furnished to him by plaintiff, evidence that she "boarded" him did not constitute either a failure of proof or a fatal variance.

*Same—Variance—When Immaterial.*

2. A variance which did not mislead defendant in making his defense upon the merits must be deemed immaterial.

[As to right of appellate court to reverse judgment on its own motion for variance, see note in *Ann. Cas.* 1914A, 468.]

*Same—Work and Labor—Evidence of Value—Opinions.*

3. A housekeeper and laundress of long experience was qualified to testify to the reasonable value of her services rendered and the supplies furnished defendant while boarding him.

*Appeal and Error—Conflict in Evidence—Affirmance.*

4. Where a verdict, based upon evidence in substantial conflict has the approval of the district court as shown by its denial of a new trial, the supreme court will not interfere even though the evidence as appearing in the record, seems to preponderate in favor of the appellant.

*Appeal from District Court, Silver Bow County, in the Second Judicial District; Ben B. Law, Judge of the Ninth District, Presiding.*

ACTION by Annie Matoole against Jerry R. Sullivan. Judgment for plaintiff, and defendant appeals from it and an order denying him a new trial. *Affirmed.*

Mr. Peter Breen and Mr. A. C. McDaniel, for Appellant, submitted a brief; Mr. Breen argued the cause orally.

There was a variance and failure of proof. There is a material difference between "cooking" for a man and "furnishing him merchandise" and "boarding him." "Furnish" as used in the

complaint, is equivalent to "sold and delivered," that is, she sold and delivered groceries, fuel, etc., to the defendant.

To "furnish" means to supply or provide. (*Delp v. Bartholomay Brewing Co.*, 123 Pa. St. 42, 15 Atl. 871; *Burns v. Sewell*, 48 Minn. 425, 51 N. W. 224.) The verb "board" means to receive food as a lodger, or without lodging, for a compensation. (*Pollock v. Landis*, 36 Iowa, 651.) To allege merchandise sold and delivered and to prove board certainly constitutes a total failure of proof. A complaint cannot be made elastic so as to bend to the changing views of counsel as the case proceeds. It must proceed to the end upon the theory upon which it is constructed. (*Toledo etc. R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773; *Sanders v. Hartge*, 17 Ind. App. 243, 46 N. E. 604; see, also, *Schulz v. Annick* (Tex. Civ.), 29 S. W. 916; *Hamilton v. James A. Cushman Mfg. Co.*, 15 Tex. Civ. 338, 39 S. W. 641.)

There is another ground of variance and failure of proof. The plaintiff sues upon implied contract, but proves, if anything, an express contract to give a house for services, etc., or "to pay right," as she sometimes puts it. (*In re Craigie's Estate*, 24 Mont. 37, 60 Pac. 495.) Where the complaint is laid in contract and the evidence showed money had and received, there will be a reversal because of failure of proof. (*Haley v. McDermott*, 45 Mont. 217; *Lines v. Lines*, 54 Iowa, 600, 7 N. W. 87.) Where the action is on an implied contract to pay the reasonable value of services, and the proof shows an express contract, the variance is fatal. (*Wisbey v. Boyce* (Tex. Civ.), 27 S. W. 590.)

There is no evidence of the reasonable value of any of the amounts claimed by the plaintiff. She makes the statement in answer to several questions that a certain item is reasonably worth a certain amount. This was insufficient. In an action to recover the value of tools sold, a list of the tools, made by a person whose only knowledge of its correctness was hearsay, was offered to show their value. Such evidence was refused. (*Keller v. Bley*, 15 Or. 429, 15 Pac. 705.) To entitle a claimant to

enforce a claim against a decedent's estate for attendance and services, it is essential to offer evidence from which the value of the services may be found. (*Luizzi v. Brady's Estate*, 140 Mich. 73, 103 N. W. 574; see, also, *Sims v. Petaluma Gaslight Co.*, 131 Cal. 656, 63 Pac. 1011; *Harris v. Russell*, 93 Ala. 59, 9 South. 541; *Alexander v. McNear*, 28 Fed. 403; *Schwerin v. De Graff*, 19 Minn. (Gil. 359) 414; *Thompson v. Hartline*, 84 Ala. 65, 4 South. 18.)

*Mr. Louis E. Haven* and *Mr. J. L. Eberle*, for Respondent, submitted a brief; *Mr. Haven* argued the cause orally.

Counsel would give some peculiar meaning to the word "furnish" as used in the complaint and endeavor to show that it meant "delivered," whereas the proof showed that it was merely furnished and supplied to appellant and prepared for him at the house of respondent. We merely cite the court to Words and Phrases, 310-313, where it appears that "furnish" means to provide or to supply, and on page 313, quoting from *Winslow v. Urquhart*, 39 Wis. 260, at 268, "furnish" in that state is construed to include a cook rendering services for a logging crew and giving him a lien for furnishing supplies.

The authorities clearly show that a witness such as the respondent is qualified to testify as to such services and personal property as those in question here. (17 Ency. of Law and Procedure, 112, 113, 116; 1 Wigmore on Evidence, secs. 715, 716; *Porter v. Hawkins*, 27 Mont. 486, 71 Pac. 664; *O'Meara v. McDermott*, 40 Mont. 38, 104 Pac. 1049; *Storms v. Lemon*, 7 Ind. App. 435, 34 N. E. 644; *Hufford v. Neher*, 15 Ind. App. 396, 44 N. E. 61; *Seckerson v. Sinclair*, 24 N. D. 326, 625, 140 N. W. 239; *Lincoln Supply Co. v. Graves*, 73 Neb. 214, 102 N. W. 457; *Sandberg v. Borstadt*, 48 Colo. 96, 109 Pac. 419.)

MR. JUSTICE PIGOTT delivered the opinion of the court.

In this action plaintiff recovered judgment from which, as well as from an order denying him a new trial, defendant appeals.

The complaint states two causes of action which are, in substance, that between March 10, 1905, and July 15, 1914, plaintiff at defendant's request performed work and labor and rendered services consisting of cooking, washing, and caring for defendant, and cleaning and taking care of his house, of the reasonable value of \$2,359; and that between those dates, at the like request, plaintiff furnished and delivered to defendant goods, materials, and supplies, consisting of groceries, fuel, and other goods, of the reasonable value of \$1,260.35,—of which sums but ten dollars had been paid, leaving due to plaintiff \$3,566.

The overruling of defendant's demurrer to each cause of action is the first error specified; but since it is not argued or further mentioned it will not be considered. All the allegations of the complaint were denied by the answer, and no question of the statute of limitations has been raised. The jury returned a verdict for \$1,750.

1. To establish her case, plaintiff introduced evidence tending to prove that at sundry times between the dates mentioned she had washed for defendant, had cleaned his house, and had furnished him with board at her home, plaintiff stating the reasonable value of the wood, coal and materials bought and paid for by her and which she used in cooking for defendant, and the reasonable value of her services in cooking, cleaning, and washing for him. She also testified that the services were performed, and the materials bought and furnished, at his request, and that he promised to pay her what "was right," and that at times he promised to build and give her a house in satisfaction of her claims. The evidence for defendant was in flat contradiction of that adduced for plaintiff.

Defendant asserts that there was a failure of proof in this: [1] That whereas the complaint states, among other things, that plaintiff furnished groceries, fuel, and other goods to defendant, and rendered services in cooking for him, the evidence disclosed that the plaintiff "boarded" defendant and did not "cook" or "furnish" groceries, fuel, and other goods for him,



insisting that the supposed difference between "cooking" for him and "furnishing" to him groceries, fuel, and other goods, upon the one hand, and "boarding" him, upon the other, makes a fatal variance in that particular between the causes of action as stated and those proved. Manifestly, however, in the circumstances here disclosed, the boarding of defendant embraced the items of cooking for and furnishing him with groceries, fuel, and other things necessary to the "boarding"; or, at the very least, the cooking and the furnishing of the food and fuel necessary for that purpose were part of the "boarding." At defendant's request plaintiff furnished the groceries and other edibles (for the most part in raw state) which she cooked for him with fuel also furnished by her; the food so cooked by her was served to defendant, who consumed it. For all this defendant promised to pay. Whether it be held that she thus "furnished board" for defendant, or that she performed such services for him and furnished such food and fuel to him, matters not. In any event, the objection presented by the specification [2] of error is a mere technicality which did not affect the merits. There was neither failure of proof nor substantial variance; but if there was a variance it did not mislead the defendant to his prejudice in making his defense upon the merits, and therefore was not material. (Rev. Codes, sec. 6585.)

2. Next it is argued that plaintiff was not shown to be qualified to testify as to the reasonable value of the services which she had rendered and the merchandise and the supplies which she had furnished to defendant.

The evidence shows that she was sufficiently familiar with the worth of the services and merchandise to make admissible her testimony in that regard. She was a housekeeper and laundress of long experience. The merchandise furnished by her was such as housekeepers are accustomed to buy and they may be presumed "to have such knowledge upon the subject as to render them competent to testify as to the value of such articles." (*Erickson v. Draskowski*, 94 Mich. 551, 54 N. W. 283; *semble*, *Porter v. Hawkins*, 27 Mont. 486, 71 Pac. 664, and

*Osmers v. Furey*, 32 Mont. 581, 81 Pac. 345.) Moreover, the owner of commodities in general daily use is qualified to estimate their worth, the weight of his testimony being for the jury. (1 Wigmore on Evidence, sec. 716.) As to her testimony in respect of the value of her services, "it would be a hard rule which would prevent a plaintiff from informing the jury of his own estimate of the value of his services; and the courts seem inclined to impose no terms as to his general familiarity with the class of services; that he had rendered them justifies listening to his opinion." (1 Wigmore on Evidence, sec. 715.)

3. Defendant's final contention is that a new trial should have been granted on the ground that the evidence was insufficient in weight to justify a verdict for plaintiff, defendant asserting in effect that plaintiff's testimony was inherently so weak, and indeed, incredible, as to demand a verdict in his favor.

The evidence was in substantial conflict. It need not be set [4] out. We adopt as applicable to the instant case the following language of Mr. Justice Holloway speaking for the court in *Nilson v. City of Kalispell*, 47 Mont. 416, 132 Pac. 1133: "The best that can be said of the evidence is, that it presents a proper case for the jury. The jurors were the judges of the credibility of plaintiff and his other witnesses. The plaintiff's story was accepted as true by the jury and by the trial court in passing upon the motion for a new trial. In the absence of anything indicating such inherent improbability in the story as to deny its credibility, we are not disposed to question the truth of his statements," citing *Lehane v. Butte El. Ry. Co.*, 37 Mont. 564, 97 Pac. 1038, where the court through the same justice said: "The motion for a new trial was addressed to the sound discretion of the trial court, and, in the absence of a clear showing of abuse of such discretion, this court will not interfere. \* \* \*

We agree with what is said in the cases cited by appellant upon the question of a bare scintilla of evidence being insufficient to support a verdict; but this case does not present that question

at all. We think there is substantial evidence to support this verdict \* \* \* , and under such circumstances this court has repeatedly said that it will not disturb the finding of the lower court upon a question of fact. \* \* \* With respect to the verdict, we observe that while the evidence, as it appears in type, seems to preponderate in favor of the defendant, it was nevertheless sufficient to justify the verdict against him. The weight of the evidence was for the jury." This rule has been just applied in *Roberts v. Sinnott*, below.

Plaintiff's evidence was not so inherently weak or palpably improbable as to demand a verdict for defendant. It was sufficient to justify the verdict and in denying a new trial there was no abuse of discretion.

The judgment and order are affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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ROBERTS, RESPONDENT, v. SINNOTT, APPELLANT.

(No. 3,739.)

(Submitted December 3, 1918. Decided December 16, 1918.)

[177 Pac. 252.]

*Building Contracts—Change of Plans—Extra Work—Substantial Performance—Pleading—Causes of Action—Numbering—Theory of Case—Evidence—Appeal and Error—Conflict in Evidence.*

Pleading—Causes of Action—Failure to Separately State and Number—Remedy.

1. Where several causes of action are not separately stated and numbered, as required by Revised Codes, section 6533, the remedy is not by demurrer, but by motion to make definite and certain.

Building Contracts—Extra Work—Oral Agreement Modifying Written Contract.

2. Notwithstanding a provision in a building contract that no charges for extra work or for change of material would be allowed unless in

writing and accepted, the parties to such a contract may make subsequent independent oral agreements, which, when executed, have the effect of modifying the original contract.

Same—Substantial Performance—Burden of Proof.

3. Plaintiff has the burden of proving the expense of supplying omissions in the performance of a building contract he sues upon, if he alleges substantial performance, or where he alleges full performance and his evidence establishes substantial performance only.

Same—Substantial Performance—Effect.

4. Where plaintiff pleads and tenders evidence to prove complete performance, he will not be dismissed from court merely because the evidence in its entirety warrants a finding of substantial performance only, if there is evidence offered by either party from which the cost of supplying the omissions can be determined.

Same—Appeal—Theory of Case.

5. On appeal a party is bound by the theory upon which he tried his case in the district court.

Same—Substantial Performance—Jury Question.

6. Whether plaintiff substantially performed a building contract was a question for determination by the jury.

Same—Defective Work—Compliance With Plans—Effect.

7. Where the roof on a dwelling was constructed by plaintiff according to plans which were satisfactory to defendant, the latter could not claim damages because it leaked.

[As to measure of damages for defective work under building contract, see note in *Ann. Cas.* 1913B, 781.]

Same—Remedying Defect—Evidence—Admissibility.

8. In the absence of evidence that the reasonable value of a new roof covering did not exceed a covering laid by plaintiff according to plans and specifications, evidence as to the amount paid by defendant for the new work was properly excluded.

Appeal—Correct Ruling—Wrong Reason.

9. Where a ruling of the district court in the exclusion of evidence was right, the fact that the reason for it was erroneous is immaterial.

Same—Instructions—Presumptions.

10. In the absence of anything to indicate the contrary, it will be assumed on appeal that the jury observed the instructions of the trial court.

Same—Conflict in Evidence—Affirmance of Judgment.

11. With a verdict rendered on substantially conflicting evidence and which has the indorsement of the trial judge as evidenced by his refusal to grant retrial, the supreme court will not interfere.

*Appeal from District Court, Jefferson County, in the Fifth Judicial District; John B. McClernan, a Judge of the Second District, Presiding.*

ACTION by Paul P. Roberts against Clarence C. Sinnott, judgment for plaintiff, and from it and an order denying his motion for a new trial, defendant appeals. Affirmed.

*Messrs. Day & Mapes*, for Appellant, submitted a brief; *Mr. E. C. Day* argued the cause orally.

*Messrs. J. E. and D. M. Kelly*, for Respondent, submitted an original and a supplemental brief; *Mr. D. M. Kelly* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff contracted in writing to furnish certain materials and perform the work necessary for the erection of a dwelling-house for defendant for the sum of \$4,727. This action was instituted to recover a balance alleged to be due and to foreclose a mechanic's lien. Upon the trial plaintiff abandoned his claim for a lien, and the cause then proceeded as an ordinary action at law, resulting in a verdict in favor of the plaintiff for \$500. Defendant appealed from the judgment entered on the verdict, and from an order denying his motion for a new trial.

The plaintiff counts upon the original agreement and each of twenty-five oral contracts supplemental thereto, but failed to separately state or number his several causes of action. A demurrer for ambiguity and uncertainty was overruled. When plaintiff sought to prove the work done and material furnished under each of the supplemental agreements, an objection was interposed but overruled, and error is predicated upon the ruling.

The original contract contains this stipulation: "No charges for extra work will be allowed unless same be ordered in writing by the owner, price stated in the order and accepted by the contractor and owner, signed in duplicate, and the same applies to any change of material used." Appellant insists that by overruling the demurrer the trial court must have held that the complaint states but a single cause of action, and upon that theory his objection to the testimony should have been sustained. If the premise were correct, the conclusion might follow, but appellant is in error in the construction which he places upon

[1] the action of the court. The complaint is open to criticism in that the several causes of action are not separately stated and numbered, as required by section 6533, Revised Codes, but defendant did not invoke an available remedy. Section 6534, Revised Codes, enumerates the grounds of demurrer, and the failure to separately state and number the causes of action joined in a complaint is not one of them. The defect can be reached only by motion. (*Marcellus v. Wright*, 51 Mont. 559, 154 Pac. 714.)

The provision of the contract above was manifestly intended for the protection and benefit of the owner, and no reason can be suggested why it might not be waived. The authorities are [2] quite uniform in holding that, notwithstanding such a provision, the parties may make subsequent independent oral agreements which, when executed, have the effect of modifying the original contract, and the rule has been recognized in this jurisdiction. (*Wortman v. Kleinschmidt*, 12 Mont. 316, 30 Pac. 280; *Piper v. Murray*, 43 Mont. 230, 115 Pac. 669; *Interstate Lumber Co. v. Western M. & W. T. Co.*, 51 Mont. 190, 149 Pac. 975.)

Appellant insists that plaintiff cannot recover at all except upon showing performance of the contract in its entirety, and if this reference is to the original contract as modified by the subsequent oral agreements, the correctness of the position is not open to argument. (*Riddell v. Peck-Williamson etc. Co.*, 27 Mont. 44, 69 Pac. 241.) Plaintiff alleges that he fully kept and performed the agreement in all things by him to be kept and performed, and tendered evidence in support of his plea. It is true that defendant introduced evidence tending to prove substantial defects in material and workmanship, but the most that can be said of this is that it presented an issue for the jury. Under our Code practice, which requires a party to set forth the facts constituting the basis for any affirmative relief sought, [3] it is the rule that if plaintiff alleges substantial performance of his contract, as distinguished from complete performance, he has the burden of alleging and proving the expense of

supplying the omission (*Spence v. Ham*, 163 N. Y. 220, 51 L. R. A. 238, 57 N. E. 412), or if he alleges full performance and his evidence establishes substantial performance only, the same burden of proof is imposed upon him; but it is equally true [4] that if he pleads complete performance and tenders evidence to support the plea, he will not be dismissed from court merely because the evidence in its entirety warrants a finding of substantial performance only, if there is evidence offered by either party from which the cost of supplying the omissions can be determined. (*Rowe v. Gerry*, 112 App. Div. 358, 98 N. Y. Supp. 380; affirmed, 188 N. Y. 625, 81 N. E. 1175.)

At the request of the defendant the court gave instruction No. 5, which, after referring to the character of the action, proceeds: "The burden of proof is upon the plaintiff to show that he performed the contract for the construction of said building and the doing of the extra work in a good and workmanlike manner. The law requires substantial performance of the contract. By the term 'substantial performance' is meant that the work as done is free from all defects of a permanent character or such as cannot be remedied by slight alterations or without reconstruction. If you believe from the evidence that the building has not been constructed in such a substantial manner but that it contains defects which cannot be remedied without reconstruction, then the plaintiff is not entitled to recover in this action, and you will find the issues against him."

Counsel for appellant err in assuming that plaintiff concedes that he failed to perform the contract in substantial particulars. As we read the record, he does not ground his right to recover even upon substantial performance, but insists that he fully performed the original contract as modified by the subsequent [5] agreements. The doctrine of substantial performance was introduced by the defendant himself, and it ill becomes him now to urge that the pleadings do not authorize the application of the doctrine. He is bound by the theory upon which the case was tried in the lower court. Whether there was in fact sub-[6]stantial performance in this instance was a question for

determination by the jury under the instruction above. (*Waite v. Shoemaker*, 50 Mont. 264, 146 Pac. 736.)

The contention of defendant that the court erred in refusing his offered instruction No. 14 was determined adversely to him upon the former hearing in this case. (*Roberts v. Sinnott*, 54 Mont. 114, 123, 169 Pac. 49.)

Defendant offered testimony to the effect that the roof of the [7] house as constructed by plaintiff leaked, and that it was necessary to have the shingles removed and a new covering laid. It is not seriously controverted that plaintiff constructed the roof according to the plans and specifications which formed a part of the contract, and that the defects resulted from faulty plans rather than from defective material or workmanship. It is true that the plans were prepared by the plaintiff, but he sought unsuccessfully to show that the defects in the plan of the roof resulted from defendant's insistence that the roof should have less pitch than plaintiff suggested. Defendant makes no complaint of the plans. Apparently they were entirely satisfactory to him at the time the contract was entered into. In any event, they were agreed to by the parties, and defendant cannot be heard to say that he should recoup for damages because the roof, though constructed according to contract, was not effective for the purpose intended. It is not the province of courts to make new contracts for parties.

The evidence discloses that the new roof is materially different [8] from the one called for by the plans and specifications, and, in the absence of some evidence that the reasonable value of the work and material which went into the new roof did not exceed the cost of a roof covering laid according to the plans and specifications, the evidence as to the amount paid for the [9] new work was properly excluded, and since the ruling was right, the fact—if it be a fact—that the reason for it was erroneous is not material. Even if the defects in the roof resulted from defective material or poor workmanship, defendant cannot cure the defects by the construction of a roof differing materially from the one called for by the plans and specifications



and charge the entire expense, whatever it might be, to plaintiff, for, if he could, his modesty in this instance is commendable. He might as well have had his building covered with slate or copper.

We must assume that the jury observed the instructions, in [10] the absence of anything to indicate the contrary. It is probable that an allowance by way of compensation was made to defendant for defects appearing in the work, but, if so, the jury must have found that the lapses from the strict letter of the contract were unintentional, and were minor in character; and there was some evidence from which the cost of remedying such defects might be ascertained.

The cause seems to have been tried fairly. There is a substantial conflict in the evidence, but it cannot be said that plaintiff's case is so inherently weak that it ought not to have been submitted to the jury. It is a wholesale rule which requires this court to sustain a verdict if there is evidence, apparently credible, to support it. The rule is grounded in reason. The jurors have the advantage, denied to this court, of seeing the witnesses on the stand, hearing them testify, and observing their demeanor under examination. They are to be deemed more competent, therefore, to pass upon questions of credibility and the weight to be given to the testimony. This court will not assume to say that the jurors ought to have believed evidence against their own convictions as to the truth. The verdict in this case has the sanction of the jury and also the indorsement of the judge who presided at the trial and who enjoyed the same advantage of seeing and hearing the witnesses. The fact that the printed record appears to the members of this court to indicate that defendant should have prevailed does not of itself require or justify a reversal.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE PIGOTT concur.

STATE EX REL. SMITH, PLAINTIFF, v. DUNCAN, COUNTY  
CLERK, DEFENDANT.

(No. 4,330.)

(Submitted December 14, 1918. Decided December 17, 1918.)

[177 Pac. 248.]

*Elections—Primary Election Law—Construction—County Central Committees—Power to Fill Vacancies—Mandamus.*

**Elections—Primary Election Law—County Central Committee—Power to Make Original Nomination.**

1. *Held*, that neither section 16 nor section 32 of the Primary Election Law (Laws of 1913, p. 570) empowers a county central committee to make an original nomination of a candidate to an office to be filled at a special election, the officer-elect having died soon after election and before induction into office.

**Statutes and Statutory Construction—Title.**

1a. The title of a statute is indicative of the legislative intent in passing it.

**Same—Rule.**

2. A statute must be construed in its entirety, and, if possible, meaning must be given to every word, phrase, sentence and section, the presumption being that the legislature did not employ language without meaning.

[As to rules for construction of statutes, see note in 12 *Am. St. Rep.* 826.]

**Elections—Primary Election Law—Filling Vacancy—Power of County Central Committee.**

3. A vacancy caused by the death of a state senator soon after election but before induction into office was a vacancy in the office and not in the candidacy of the nominee for the office, which latter vacancy the county central committee could properly have filled under the provisions of the Primary Election Law, while the former it had no power to fill (see paragraph 1 above).

Original application for writ of mandate by the State on the relation of Park Smith, against A. J. Duncan, County Clerk and Recorder of the County of Lewis and Clark. Motion to quash alternative writ sustained.

*Mr. E. D. Phelan* and *Mr. C. A. Spaulding*, for Plaintiff, argued the cause orally.

*Mr. Lester Loble* and *Mr. Jos. B. Wine*, for Defendant; *Mr. Wine* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

At the general election held November 5 of this year, Frank D. Miracle was elected state senator for Lewis and Clark county to fill the unexpired term of the senator elected in 1916 who resigned. On November 22 the newly elected senator died, and on November 27 a special election was duly called for December 28 to elect a senator to fill the vacancy. On November 30 the Republican county central committee, acting through its executive committee, assumed to nominate Park Smith as the candidate of the Republican party for state senator, and certified his nomination to the county clerk, who refused to file the certificate. This proceeding was instituted to have determined the question whether under the laws of this state the county central committee had authority to make the nomination. If it had, the county clerk was required to file the certificate. If it had not such authority, the clerk cannot be compelled to file the certificate.

Plaintiff must assume the burden of calling to the attention of this court some provision of law which gives countenance to the authority which the committee assumed to exercise, for clearly it exceeded any authority which vested in a like body from 1895 to 1912. Under the convention system of nomination the central committee never had authority to make original nominations. It was only after a duly constituted convention had made a nomination and a vacancy occurred before the election that the committee was authorized to act. It did not make an original nomination, but merely filled the vacancy. But [1] counsel for plaintiff rely upon the provisions of section 32 of the Direct Primary Election Law (Laws 1913, p. 570) for the authority exercised by the committee in this instance. Was it the purpose of that Act to clothe the central committee with power to make a nomination originally? We think not. Such a construction of the language of section 32 would lead to a result at war with the intent and purpose of the entire measure. It is entitled "A law to provide for party nominations by direct

vote," and the title of a statute is indicative of the legislative intent in passing it.

Within the compass of this Act it was clearly the purpose to confer the power to make original nominations upon the electors voting at a primary election. If we eliminate from the Act the idea of direct nominations by the electors, nothing whatever of consequence remains. In order to interpret the statute, that fundamental purpose must be kept constantly in view, and every section of the Act read with that idea in mind.

Section 32 provides for the election of a central committee-man in every precinct, for the organization of the county and city central committees, and confers upon such committees specific authority as follows: "Said county and city central committees shall have the power to make nominations to fill vacancies occurring among the candidates of their respective parties nominated for city or county offices by the primary nominating election, where such vacancy is caused by death or removal from the electoral district, but not otherwise." No authority is here given to make an original nomination, but the power conferred is limited strictly to filling vacancies occurring among candidates nominated by the primary nominating election. As if to add emphasis to the fact that very limited authority was intended to be conferred upon the committee, the statute restricts the causes for which a vacancy may occur, to death or removal of the candidate from the jurisdiction. It will be observed that though the naked authority is conferred by the section, no provision is made for its exercise; but a statute is to be construed in its entirety, and by turning to section 16 we are apprised of the procedure necessary to be followed by the committee in filling such a vacancy.

Counsel argue that section 16 itself confers upon the committee the authority to fill vacancies occurring after the primary and before the general election, and insist that the language of section 32 must be construed to give some additional authority, otherwise it is meaningless. It is an elementary rule that in [2] construing a statute the court must give meaning to every

word, phrase, sentence and section, if possible to do so, and the rule is grounded in the presumption that the lawmakers did not employ language without meaning. We encounter no difficulty, however, in applying that rule to the provisions of the two sections now under consideration.

We have given our interpretation to section 32. Section 16 refers to the same character of vacancy, and provides: "Such vacancy may be filled by the committee which has been given power by the political party *or this law* to fill such vacancies substantially in the manner provided by sections 529 and 530, Revised Codes of Montana 1907."

It will be observed that this language is general. It refers to any central committee recognized by the Act. It authorizes such committee to exercise certain powers when delegated to it by the political party for which it stands sponsor, or when conferred *by this Act*.

The only authority which a state or district central committee has to fill vacancies is delegated authority, derived from the political party, whereas the like power is conferred upon the county and city central committees by the express provisions of section 32 of this Act. This latter section creates the county and city central committees and defines their powers. Section 16 defines the circumstances under which they may exercise the powers, and prescribes, by reference, the mode of procedure. It likewise recognizes the authority of the state and district committees to fill vacancies when authorized by the parent political organization to do so. The same fundamental principle pervades this Act as the prior statute, *viz.*: The committee has no authority to make an original nomination. Its power is limited to filling vacancies which occur after nominations have been regularly made.

Finally it is insisted that since Mr. Miracle was nominated [3] at the primary nominating election held in August last, his death after election created a vacancy within the meaning of section 32 above, and that the committee did nothing more than fill that vacancy. We are unable to appreciate the subtle re-

finement of reasoning which would justify such a conclusion. If at the time of his death Mr. Miracle was a candidate for state senator, then his death created a vacancy which the committee could fill. If he was not such a candidate, then his death created a vacancy in the office of state senator, but not a vacancy in the candidacy of the Republican nominee. Mr. Miracle was elected to office on November 5, and when the polls closed on that day he ceased to be a candidate.

Many of the provisions of the primary election law are crudely drawn, and some of them are almost unintelligible, but we believe that the construction we have given the Act expresses the intention of the people in enacting it.

For the reason that the committee has not any authority under the primary law or other statutes to make an original nomination, as was attempted in this instance, the motion to quash the alternative writ is sustained, and it is ordered and adjudged that plaintiff take nothing, and that defendant recover his costs.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE PIGOTT concur.

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STATE EX REL. REIBOLD, PLAINTIFF, v. DUNCAN, COUNTY  
CLERK, DEFENDANT.

(No. 4,333.)

(Submitted December 14, 1918. Decided December 17, 1918.)

[177 Pac. 250.]

*Special Elections—Primary Election Law—Construction—  
Nomination of Candidates—Mandamus.*

**Special Elections—Primary Election Law—Nominations—How Made.**

1. *Held*, that since the Primary Election Law (Laws 1913, p. 570), is made applicable only to general elections, fails to provide for the nomination of candidates to be voted for at special elections, and does not repeal prior statutes on the latter subject, sections 521 and 524, Revised Codes, are still in force, and therefor nominations of candidates to be voted for at special elections must be made pursuant to the provisions of either section 521 or 524.

Same—County Clerk—*Mandamus*.

2. *Held*, on application for writ of mandate, that where a large number of qualified electors joined under the provisions of section 524, Revised Codes, in a certificate nominating a candidate for state senator to be voted for at a special election and presented same to the county clerk for filing, it was that officer's duty to file it, under paragraph 1 above.

Original application for writ of mandate by the State on the relation of Charles Reibold, against A. J. Duncan, as County Clerk and Recorder of Lewis and Clark County.

*Mr. Henry C. Smith*, for Plaintiff, submitted a brief and argued the cause orally.

*Mr. Lester Loble* and *Mr. Jos. R. Wine*, for Defendant, submitted a brief; *Mr. Wine* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

A reference to the decision in *State ex rel. Smith v. Duncan*, ante, p. 376, 177 Pac. 248, will suffice for a statement of the circumstances out of which this proceeding arises.

Charles Reibold and 283 other qualified electors of Lewis and Clark county joined in a certificate, nominating Park Smith as a candidate for state senator, to be voted upon at the special election to be held on the 28th of this month. They presented the certificate to the county clerk, but he refused to file it, and this proceeding was instituted. There is involved the single question: Did the adoption of the General Primary Law (Laws 1913, p. 570) operate to repeal in their entirety all prior existing laws which governed the nomination of candidates for public office?

It cannot be doubted that to the full extent to which the primary law was intended to operate, all original nominations must be made by direct vote of the electors at the primary nominating election. In theory, this Act recognizes the right of the different groups of electors to maintain their respective party organizations, and to be represented at the polls by nominees of [1] their own political faith. The dominating purpose of the

Act is to assure to every elector an opportunity to participate directly in the selection of candidates for public office, afford the protection of public supervision of the election machinery, and secure the right of free expression of opinion by the application of the safeguards of the Australian ballot system. But no provision is made for a primary election to nominate candidates to be voted upon at special elections; on the contrary, the terms of the Act are made applicable to nominations to be voted on at general elections only. Section 2 declares: "On the seventieth (70) day preceding any general election (not including special elections to fill vacancies, municipal elections in towns and cities, irrigation district and school elections) at which public officers in this state and in any district or county are to be elected, a primary nominating election shall be held in accordance with this law," *etc.*

Since the primary election under public control is the very essence of the Act, it must follow that, in failing to make provision for such election to nominate candidates to be voted upon at special elections, the lawmakers intended that the Act in its entirety should be construed as limited in its operations to the nominations of candidates to be voted for at general elections, and that every section should be read with this construction in mind. Under any other view we would find ourselves confronted with a repeal of all existing statutes governing nominations, and no provision whatever made for the nomination of candidates to be voted for at special elections.

The purpose of the primary law is not to prevent nominations, but to subject them to public regulation and control as far as it was deemed practicable; and this court is not justified in saying that the laws of this state now prohibit the nomination of a candidate to be voted for at a special election, unless the language employed to express such intention is clear and unequivocal. Under the construction we adopt, the meaning of section 8 and the repealing clause becomes manifest. The opening sentence of section 8 would read: Every political party shall nominate all its candidates for public office [to be voted



for at a general election] under the provisions of this law and not in any other manner, and it shall not be allowed to nominate any candidate [to be voted for at a general election] in the manner provided by section 521 of the Revised Codes, *etc.* By the repealing clause, prior statutes governing nominations were repealed in so far as they had to do with nominations of candidates to be voted for at general elections, and those statutes, in so far as they controlled nominations of candidates to be voted upon at special elections, are still in full force and effect.

We do not agree with counsel that the primary election law was designed to furnish the exclusive means by which all candidates for public office shall be nominated, and that the failure of that Act to provide for nominations of candidates to be voted for at special elections was a mere oversight. The references in sections 2 and 7 indicate clearly that the subject was not overlooked, but for some sufficient reason it was evidently considered that the provisions of the direct primary law are inapplicable to the nomination of candidates to be voted for at special elections, and that subject was reserved for control by existing laws or future legislation. No subsequent enactments dealing with the matter have been passed, and the authority to make such nominations must be sought in prior statutes.

The nomination of a candidate to be voted for at this special [2] election might be made pursuant to the provisions of section 521, or section 524, Revised Codes, and since the certificate tendered by this plaintiff complies in all respects with the requirements of section 524, the county clerk was not justified in refusing to file it.

It is ordered, adjudged and decreed that a peremptory writ of mandate issue from this court, directed to the defendant as county clerk and recorder of Lewis and Clark county, commanding him forthwith to file the certificate of nomination tendered by the plaintiff, and that plaintiff have and recover his costs in this behalf expended, taxed at \$——. *Remittitur* at once.

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE PIGOTT concur.

**BARNARD REALTY CO., APPELLANT, v. CITY OF BUTTE,  
RESPONDENT.**

(No. 3,917.)

(Submitted December 4, 1918. Decided December 30, 1918.)

[177 Pac. 402.]

*Cities and Towns—Streets and Highways—Easement by Prescription—Evidence—Insufficiency—Appeal and Error—Law of Case—Equity Cases—Review.*

**Appeal and Error—Law of Case.**

1. A holding of the supreme court on appeal becomes the law of the case on a retrial and on a subsequent appeal.

**Cities and Towns—Streets—Easement by Prescription.**

2. The mere use of land as a public street or highway for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, does not vest the city with title by prescription to an easement in it.

**Appeal and Error—Equity Cases—Extent of Review.**

3. The supreme court on appeal in equity cases must, under section 6253, Revised Codes, review and determine all questions of fact, due allowance being made for the more advantageous position occupied by the trial judge in passing upon the credibility of the witnesses, as well as questions of law, unless for good cause shown a new trial should be ordered.

**Cities and Towns—Streets—Easement by Prescription—How Acquired.**

4. A city cannot acquire a prescriptive right to an easement in land for street purposes, unless public travel has pursued a definite, fixed course over it for the statutory period.

[As to creation of title by prescription, see notes in 14 Am. Dec. 67; 95 Am. St. Rep. 671.]

**Same—Acquisition of Easement—Quantum of Proof.**

5. The assertion of an easement in land for street purposes based upon adverse user for the statutory period, must be supported by clear and convincing proof.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

**ACTION** by Barnard Realty Company against the City of Butte. From a decree for defendant and an order denying its motion for new trial, plaintiff appeals. Reversed, with directions to enter decree for plaintiff.

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Authorities passing on the question of easement in highway acquired by prescription are collated in a note in 11 L. E. A. 55.

*Mr. E. M. Lamb* and *Mr. E. B. Howell*, for Appellant, submitted a brief; *Mr. Howell* argued the cause orally.

*Mr. J. V. Dwyer*, *Mr. John A. Groeneveld* and *Mr. N. A. Rotering*, for Respondent, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is the second time this cause has been before this court. The first trial in the district court resulted in findings and a decree in favor of the defendant. On appeal this court reversed the decree and awarded plaintiff a new trial on the ground that the evidence was insufficient to sustain the findings (48 Mont. 102, 136 Pac. 1064). By referring to the statement preceding the opinion delivered on that appeal, illustrated by the accompanying diagram, a full understanding may be had of the subject matter involved. Before the second trial the defendant was permitted to amend its answer by alleging an easement in the area of land in controversy shown by the heavy lines on the diagram, by adverse possession and use of it by the general public as a street and highway for a period of twenty-two years at the time the action was commenced. Otherwise the issues remained the same. The court again found in favor of the defendant, and rendered and entered a decree accordingly. Plaintiff has appealed from the decree and an order denying its motion for a new trial, and submits the single question whether the evidence is sufficient to sustain the findings.

The court found: (a) That the general public traveled over the area in dispute and used it as a street and highway continuously from the year 1899 to July, 1911, the date of the commencement of this action; and (b) that in the latter part of the month of June, 1901, the defendant assumed control of and exercised jurisdiction over the said area, and treated it as a public street and improved it as such. The defendant introduced witnesses whose testimony tended to show that, while the area included in the Saturn and Neptune additions was sub-

stantially open and unoccupied after the Barnard addition was made to the city in 1899 and the area immediately to the north of the area in dispute (designated on the diagram by the word "Alley") was dedicated as a highway, the area in controversy was commonly traveled by persons who wished to go from the city to Rocker and other points lying to the southwest, or who traveled from these points to the city. For illustration, the witness Stephens testified that he was familiar with the area as early as the summer of 1896; that at that time it was used by the public generally as a roadway, the line of travel conforming to a straight line from Alabama Street north of Mercury Street directly south to Silver Street and turning thence to the west along that street. Other witnesses testified to the same effect, some of these asserting that the public generally had traveled on a direct line from the alley south of the Columbia and Barnard additions to Silver Street and then west along that street as early as 1886. One of them stated that the roadway occupied substantially the entire width of the space included within the heavy lines, causing it to present the same general appearance as the dedicated portion of Alabama Street to the north. Some of these witnesses resided during the years 1900, 1901 and 1902, either on Mercury Street to the west of Alabama Street, or on lots in the Saturn and Neptune additions. Though these additions had been platted some years prior to 1900, most of the lots remained unoccupied until that year or later. Other of the witnesses resided at points to the west or southwest of the city. These traveled from that direction over the disputed area to and from the city, as occasion required. Still others resided in other parts of the city to the east, but traveled over the ground in dispute as their business called them in that direction.

Hugh Smith, at one time the assistant street commissioner of the defendant, testified that in June, 1901, he extended a ditch which had theretofore been constructed on the west side of Alabama Street from Galena Street to the alley in a direct line south of the alley to Silver Street to drain off the surface water in order to prevent it from cutting up the beaten way of travel

immediately east of the line of the ditch described by the other witnesses. This he stated was done at the expense of the city. At the former trial this witness had testified that he had extended the ditch in June or July. He explained the change in his testimony by saying that he recollected that he did the work during the rainy season, which occurs in Montana during the month of June. To corroborate his statement, the defendant introduced the testimony of the local observer of the United States Weather Bureau. By his records this witness showed that the rainy season for the year 1901 occurred during the months of May and June of that year, and that no more than light showers fell during July, the last falling on the 13th.

The testimony of these witnesses is not as clear and convincing as it might have been, but, taken as a whole, it is sufficient to make out a *prima facie* case that the area in controversy was used as a highway for travel along a direct line south of the alley to Silver Street and to the entire width of it, and that the city assumed jurisdiction and control over it in June, 1901, more than ten years before the action was commenced. We are nevertheless of the opinion that, taking into consideration the opportunities the plaintiff's witnesses had to observe and inform themselves as to the condition of the disputed area and the adjoining areas to the west and the character of travel over them by the public prior to 1901 when the lots in the Neptune and Saturn additions began to be occupied by residences, confirmed, as it is, by maps and plats and photographs showing the actual conditions upon the ground, as to the correctness of which there was no substantial controversy, their testimony as a whole is entitled to so much greater weight that it preponderates decisively against the conclusion reached by the court. For illustration:

It was shown by a geological map made of the city and the surrounding country in 1895, under the direction of the United States government, that at the time the areas now covered by the Columbia, Barnard, Neptune and Saturn additions were open and unoccupied. A building referred to as "Clark's

barn" was located on what is now the southwest corner of Porphyry Street and Excelsior Avenue, the former being one block south of Silver Street, and the latter one block west of the disputed area. The general travel from the city to the south and west was then confined to two roads, both leaving the city from Park Street one block north of Galena Street. One of these extended from Park Street in a southwesterly direction, passing near Clark's barn, the other lying farther to the north and extending in a more westerly direction. No line of travel is shown by this map over the disputed area from what was then dedicated as a portion of Alabama Street to the north. Several witnesses testified that this map correctly represented the routes of travel to the south and southwest at that time, and no witness questioned its correctness. Generally, the evidence tended to show that as the lots in the several additions to the west of Alabama Street toward the north began to be occupied in 1901, 1902 and 1903, the most direct line of travel to the southwest was from the point where the alley south of Galena Street crosses Alabama Street "across lots," until it was gradually forced east to a line along the west boundary of the Barnard placer. The line thereafter ran, not in a direct line with the dedicated portion of Alabama Street north of the alley, but along the west boundary of the Barnard placer turning to the west over the first vacant lot reached. The reason assigned by these witnesses for this course of travel was that up to 1889 mining operations were extended from Missoula gulch toward the west as far as the west boundary of the disputed area and north to the south line of Mercury Street, leaving the surface ground rough and uneven to such an extent that travel over it, though practicable, was very inconvenient. Even after it became impossible to go "across lots" at all by reason of the erection of buildings on the lots in the Saturn and Neptune additions, the line of travel was along the triangular strip west of the disputed area, and this line is still followed from Mercury Street. That this was the condition until 1902 was demonstrated by a photograph taken of a foundation of a building in

course of erection on lot 2 in the block immediately south of Mercury Street. The beaten line of travel, as appears from this photograph, was then over lot 1, and at that time there was no evidence of the drain ditch directly south of the alley which Smith testified he dug for the city in June, 1901.

The witness Perry, who was employed by Mr. Barnard, the predecessor of plaintiff, to look after mining operations conducted by Barnard within the area of the placer, became familiar with the surface of the ground in January, 1899. At that time, he stated, there was no Silver Street, and the alley was the end of travel from Alabama Street to the south. The reason for this was that the mining operations had left the disputed area so uneven that vehicles could not easily pass over it. This condition continued, particularly south toward Silver Street, until 1906. The whole area covered by the Barnard placer began to be used as a dumping ground by the city in 1894. After the dumping had rendered the surface sufficiently smooth and even to permit persons having occasion to travel from the eastern part of the city toward the west and southwest to drive over it, they proceeded by any line the particular person chose to follow.

The witness Monroe, a surveyor, had been familiar with the Barnard Placer for about twenty years. In September, 1911, he made a map of the entire area. This map, which was introduced in evidence, shows that even at that time, instead of a single line of travel from the alley south to Silver Street, there were two, one following a somewhat irregular course over the disputed area, and the other to the west along the triangular strip from Mercury Street to Silver. Connecting with this at Mercury Street were two branches, one leading to the northeast and the other directly east, both extending toward the eastern part of the city. The irregular line over the disputed area connected with another line of travel extending from near Mercury Street southeast toward the southeastern part of the city. From various points along the course of both of these lines to the east and west were other lines running in various

directions. This condition had continued from 1906 or 1907. Silver Street was first surveyed in 1905. It was opened in 1907. The witness Kydd, who was the city engineer and who made the survey, testified that when he made it in 1905, the southern part of the disputed area was in a rough and uneven condition, rendering it impracticable for travel. This statement was corroborated by a profile map of Silver Street made at the time. He stated that when this profile was made there was no ditch extending along the west side of the disputed area to Silver Street; that if one had been there he would have observed it, and it would have appeared upon the profile. At the same time he made a chart of what would have been the intersection of Silver Street with Alabama Street, indicating the latter by dotted lines as a projected street only, because it was not then regarded an open street.

The witness Metcalf was employed in 1906 by the local telephone company to haul the poles for a telephone line to be constructed along the east side of the disputed area. He drove by way of Silver Street to the disputed area. In some places he was able to drive over the surface; in others the surface was so rough and uneven that he could not drive over it and was compelled to distribute the poles along the east line by "snaking" them over the ground with a team. During the year 1900 the city caused Mercury Street to be graded. The grading was stopped at the west boundary of the Barnard placer.

Aside from the digging of the ditch by Smith, the earliest act done by the city authorities, indicating an assumption by them of control over the disputed area, was the installation of arc-lights at Mercury and Silver Streets in the fall of 1903.

On the former appeal we held that under section 1340 of the [1, 2] Revised Codes, which is identical with section 2603 of the Political Code of 1895, the mere use of land as a public street or highway for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, was insufficient to clothe the city with title to an easement over it by prescription. That holding became the law of this case.



If this were a case at law in which the evidence were in the condition disclosed in the record, we would be compelled to sustain a verdict for defendant, because we could go no further than to determine whether the evidence introduced by the city [3] made out a *prima facie* case. In equity cases, however, such as this, we are required to review and to determine all questions of fact as well as of law, unless for good cause a new trial ought to be ordered. (Rev. Codes, sec. 6253.) The rule here declared is of necessity subject to the limitation that in determining questions of fact, due allowance must be made for the more advantageous position occupied by the trial judge, in that he has had the opportunity to observe the conduct and appearance of the witnesses while testifying. (*Bordeaux v. Bordeaux*, 32 Mont. 159, 80 Pac. 6; *Finlen v. Heinze*, 32 Mont. 354, 80 Pac. 918; *Delmoe v. Long*, 35 Mont. 139, 88 Pac. 778.) [4] After a careful examination of the large volume of evidence, only the more salient parts of which are set forth above, we are constrained to the conclusion that the weight of it is decidedly against the conclusions reached by the trial court. We do not think it sufficient to justify the conclusion that travel by the public over the disputed area has pursued a definite, fixed course over it for the statutory period, without which the prescriptive right claimed could not attach. (*State v. Auchard*, 22 Mont. 14, 55 Pac. 361; *Montana Ore Pur. Co. v. Butte & B. Consol. Min. Co.*, 25 Mont. 427, 65 Pac. 420; 37 Cyc. 12.) Nor do we think it justifies the conclusion that the city authorities assumed jurisdiction over it for street purposes at any time definitely fixed by the evidence, prior to the fall of 1903. If we assume that the ditch along the west side of the disputed area was dug by the direction of the city authorities, the evidence as to when it was dug does not justify the conclusion that this was done as early as June, 1901. The testimony of Smith, the assistant street commissioner, is so far discredited by his own conflicting statements, by other witnesses and by the physical facts disclosed by the exhibits introduced at the hearing, as to require the conclusion that he was entirely mistaken as to

[5] when the work was done. The owner of land ought not to have it subjected to the burden of a servitude for a public street over it unless the evidence presented to establish the claim to it is clear and convincing. The evidence submitted by the defendant does not meet this requirement.

The judgment and order are reversed, and the district court is directed to find for the plaintiff and render a decree accordingly.

*Reversed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE PIGOTT concur.

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LOWRY ET AL., RESPONDENTS, v. CARRIER, APPELLANT.

(No. 3,956.)

(Submitted December 5, 1918. Decided December 30, 1918.)

[177 Pac. 756.]

*Waters and Water Rights — Ditches — Easements — User — Abandonment — Evidence — Adverse Possession — Prescription — Complaint — Incompatible Claims — Equity.*

Waters and Water Rights—Ditches—Easements—Extent of User—Evidence.

1. The extent of an easement acquired by adverse user is measured by the extent of the use; hence evidence of the amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible.

[As to what constitutes appropriation of water, see note in 60 Am. St. Rep. 799.]

Same—Ditches—Public Lands—Easements.

2. Entry men on public lands over which irrigating ditches had therefore been constructed under the right conferred by sections 2339 and 2340, United States Revised Statutes, take the lands burdened with the easement thus granted.

Same—Ditches—Nonuser—Abandonment—Evidence.

3. Evidence of limited use or nonuser of an irrigating ditch is not alone sufficient to establish abandonment.

Same—Pleading—Complaint—Incompatible Theories.

4. A party may in his complaint present his claim to the use of irrigating ditches in different counts, each founded upon a different theory to meet the exigencies of the case as disclosed by the evidence, provided the theories are not incompatible.

**Same—Adverse Possession—Prescription—Incompatible Theories.**

5. Since use of one's own property cannot be "adverse" within the meaning of that term as used in the law of prescription, assertion of title to an easement over public lands granted by the federal government under sections 2339 and 2340, United States Revised Statutes, for ditch purposes, and claim of the same right under title by prescription thereafter acquired were incompatible, in the absence of abandonment.

**Same—Equity—Decree Based on Incompatible Theories—Review.**

6. Under section 6253, Revised Codes, the supreme court will in an equity case, the decree in which was founded upon incompatible theories, dispose of the cause on its merits, all the evidence being presented in the record, by eliminating from the decree findings based upon the erroneous theory, and adopting those founded upon the correct one supported by the evidence.

**Same—Ditches—Ownership—User—Evidence.**

7. The owner of a ditch right cannot be compelled to surrender it merely because its function can be performed by another ditch owned by him and not in dispute; hence evidence tending to show that all his irrigable land could be watered from a ditch other than the one title to which was at issue, was inadmissible.

**Same—Ditches—Ownership—Change of Boundary Lines.**

8. Title to a ditch constructed on what was unsurveyed public land at the time of its construction, was not affected by a change in boundary lines wrought by the official survey, causing a portion of the ditch to fall within the lines of an adjacent owner.

*Appeal from District Court, Meagher County; John A. Matthews, Judge.*

SUIT by Emma M. Lowry and others against Frank C. Carrier. From a judgment for plaintiff and an order denying a new trial, the defendant appeals. Modified and affirmed.

*Mr. E. K. Cheadle* and *Messrs. Ford & Linn*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

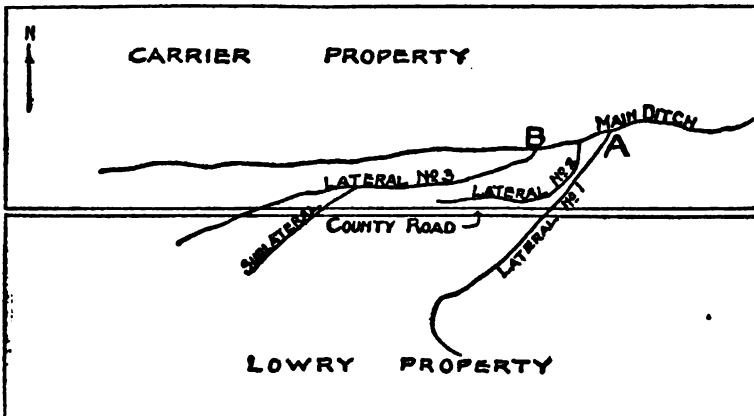
*Messrs. Wash, Nolan & Scallon*, for Respondents, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted to have determined the relative rights of the parties to certain irrigating ditches. Plaintiffs prevailed, and defendant appealed from the judgment and from an order denying his motion for a new trial.

There is no substantial conflict in the evidence. Stated in general terms, the record discloses that William Scott, Magnus Johnson and Peter Madson settled upon and inclosed certain unsurveyed, unappropriated public lands in Meagher county; that Scott's inclosure was immediately north of the inclosure of Johnson and Madson, and separated from them by a division fence; that the lands are arid and require artificial irrigation; that about 1886 Scott appropriated 600 inches of water from Sheep Creek, and constructed a main ditch running westerly from the creek to convey water upon the lands which he had inclosed; that about 1890 he sold to Johnson and Madson an undivided half interest in his water right and in his main ditch at least from the headgate to a point near his corral; that at this point a lateral ditch was constructed to convey water upon the Johnson and Madson inclosures; that later two other lateral ditches were constructed—lateral No. 2 tapping the main ditch a short distance west of the corral, and lateral No. 3 tapping the main ditch a considerable distance farther west; that a sub-lateral was constructed from lateral No. 3; that all these ditches were constructed and used before the government surveys were made; that lateral No. 3 and the sublateral were designed to be used, and were used, originally, to irrigate lands within the Johnson and Madson inclosures; that when the lands were surveyed by the government in 1898 it was ascertained that the several parcels of land mentioned did not conform to legal subdivisions; that the fence which separated the Scott claim from the Johnson and Madson claims was moved south to the quarter-section line, with the result that a strip of land theretofore within the Johnson and Madson inclosure became a part of the Scott claim; that a county road was opened between the claims; that plaintiff Lowry is the successor in interest of Johnson and Madson; that defendant is the successor in interest of Scott; that the other plaintiffs are lessees of plaintiff Lowry, and that lateral No. 1, or "Lowry Branch," is not involved in this controversy, it being conceded to belong to plaintiff Lowry.

As we understand the record, the court found that the several ditches to which reference is made in the testimony of the witnesses are correctly represented by a map (Defendant's Exhibit "A"), which is here reproduced with the addition of certain figures to identify the ditches with greater particularity:



On the map to which reference is made, lateral No. 1 is designated "Lowry Branch" and lateral No. 2 is marked "Carrier Ditch."

The issues raised by the pleadings are whether plaintiff Lowry owns or is entitled to use the main ditch from A to B, and whether she owns or is entitled to use lateral No. 3 and the sublateral. In her complaint she claims title to them: First, by virtue of the fact that they were constructed by her predecessors in interest over unsurveyed public lands; and, second, by virtue of adverse use.

The court found that the *laterals in dispute* were constructed by Johnson and Madson to irrigate lands within their inclosures, some of which lands fell within the defendant's claim when the survey was made and the fence removed to the quarter-section line. The court further found that for more than fifteen years prior to the commencement of this action plaintiff had been in the open, notorious, continuous and adverse use of said laterals under a claim of right, and that for more than ten years prior to the commencement of this action defendant, Car-

rier, had used the main ditch and laterals other than lateral No. 1. The court concluded that plaintiff Lowry and defendant each owns an undivided half interest in "said ditch, laterals and sublaterals as they pass through the premises of defendant."

The decree awards to plaintiff Lowry an undivided half interest in certain ditches and an easement in the lands of defendant through which the ditches run.

Defendant complains of rulings of the court excluding evidence, of certain findings, and of the decree.

1. Upon the trial defendant sought to show the limited [1] amount of water which had been or could be used upon plaintiff Lowry's lands and the amount used and necessary to be used on defendant's land, but the court excluded the evidence.

The respective water rights of these parties were not involved directly, but if plaintiff Lowry had grounded her title to the ditches in controversy upon prescription exclusively, the evidence would have been material. The extent of an easement acquired by adverse user is measured by the extent of the use. (Sec. 4512, Rev. Codes; 9 R. C. L. 788, and cases cited.) The court decreed to each party a one-half interest in the ditches, without reference to the extent of the use of them by either. [2] Plaintiff pleaded title by prescription, but relied also upon the fact that the ditches had been constructed by her predecessors at a time when the land over which they were constructed and now owned by defendant was open, public land of the United States, and the evidence given by defendant himself fully sustains this latter theory.

Sections 2339 and 2340, United States Revised Statutes (U. S. Comp. Stats., secs. 4647, 4649), in effect grant to the owner of a water right the right to construct ditches over the public lands for the purpose of conducting water for irrigation purposes, and in effect declare that the subsequent entryman on such lands takes them burdened with the easement. (*Cottonwood Ditch Co. v. Thom*, 39 Mont. 115, 101 Pac. 825, 104

Pac. 281.) Upon the undisputed evidence, Johnson and Madson became the owners of lateral No. 3 and the sublateral by virtue of the fact that they constructed them on public land, and as such owners they were entitled to use them, and the extent of their use was of no concern to defendant, in the absence [3] of a showing of abandonment. Evidence of limited use or of nonuser would not alone establish abandonment (*Moore v. Sherman*, 52 Mont. 542, 159 Pac. 966), and upon this theory of the case, the offered evidence was immaterial.

While it was permissible for plaintiffs in their complaint to [4, 5] present their claim to these ditches in different counts, each founded upon a different theory to meet the exigencies of the case as disclosed by the evidence (*Blankenship v. Decker*, 34 Mont. 292, 85 Pac. 1035), it was not possible for them in this instance to maintain both theories, for they are incompatible; yet the court finds that both theories are sustained by the evidence. If lateral No. 3 and the sublateral were constructed by Johnson and Madson over public land, their right to the ditches was confirmed by the government which owned the land; and, in the absence of abandonment, they could not thereafter acquire the same character of title by adverse user.

Use by a party of his own property is never adverse in the sense that the term "adverse" is employed in the law of prescription. "Adverse possession is the open and hostile possession of land under a claim of title to the exclusion of the true owner." (1 Words and Phrases, Second Series, 136; *Scallon v. Manhattan Ry. Co.*, 185 N. Y. 359, 7 Ann. Cas. 168, 78 N. E. 284.)

We are confronted by a decree founded upon theories altogether inconsistent; but this is a suit in equity. The evidence in its entirety is before us, and we are authorized by section 6253, Revised Codes, to dispose of the cause on its merits. (*Pew v. Johnson*, 35 Mont. 173, 119 Am. St. Rep. 852, 88 Pac. 770.) If the theory of adverse user be adopted, a new trial must be ordered (1) for the error of the court in excluding evi-

dence of the extent of the use; and (2) because the evidence is insufficient to sustain the finding that plaintiff Lowry acquired a one-half interest. But the evidence is sufficient to sustain the findings to the effect that title to lateral No. 3 and the sublateral was acquired by virtue of the fact that those ditches were constructed by Johnson and Madson over public land and that plaintiff Lowry succeeded to their rights, and we adopt this theory of the case. It involves the elimination from finding No. 7 of all reference to the adverse use of these ditches by plaintiff Lowry and her predecessors in interest.

Complaint is made also that the court refused to permit defendant to show that all of plaintiff Lowry's irrigable land can be watered successfully from the "Lowry Branch." The ruling was correct upon either theory of the case indicated above. If plaintiff Lowry acquired an interest in lateral No. 3 and the sublateral, either by grant or prescription, she cannot be compelled to surrender that property right because its function can be performed by other property which she owns.

2. Defendant cannot complain that the court found that Johnson and Madson constructed lateral No. 3 and the sublateral. His own testimony, given on cross-examination, establishes the fact beyond controversy. Neither can he object that the court awarded to plaintiff Lowry an undivided half interest in those ditches, for upon the theory of the case now under consideration, the court might have awarded them to her in their entirety. She, however, does not complain of the limited interest decreed to her, nor of the fact that the decree does not, in express terms at least, award her any interest in the main ditch between points A and B.

It is not made plain upon what theory the court granted to defendant an undivided half interest in lateral No. 3 and the sublateral. Assuming that these ditches belonged to plaintiff Lowry and her predecessors from the date of their construction, they remained her property after she succeeded to the interests of Johnson and Madson, unless she abandoned them in whole or in part, or unless defendant acquired an interest in them by



prescription, and the evidence does not sustain either of these alternatives; furthermore, defendant does not claim that he acquired title by adverse user, but, on the contrary, he denies that plaintiff Lowry or her predecessors ever had any interest in any lateral or sublateral other than lateral No. 1, the "Lowry Branch." However, as neither party complains of the decree in the particulars just mentioned, we refrain from further comment upon them.

3. Lateral No. 3 and the sublateral were constructed to irrigate lands originally within the Johnson and Madson inclosures, but the fact that a portion of those lands fell within the lines of defendant's claim when the survey was made and the division fence was moved did not operate to divest plaintiff Lowry of her title to the ditches or invest defendant with title to them.

4. In its conclusion of law No. 2 the court declared that plaintiff Lowry "is entitled to the right to use said ditch, laterals and sublaterals as they pass through the premises of the defendant." The language is indefinite, but sufficiently comprehensive to include ditches not in controversy, and to which plaintiff Lowry neither has nor claims any right. The decree awards to Mrs. Lowry "an undivided one-half interest in the lateral ditches mentioned and described in her complaint" and "an easement in the land of defendant through which said ditches run," and then, as if to identify with minute particularity the ditches referred to, the decree continues: "The said ditches being the ones west of the first lateral tapping the main ditch which takes water to the land of the plaintiff Emma M. Lowry, the said ditches being about three feet wide on top and about two feet deep, and each being about 600 feet in length as they run through defendant's land." The only ditches mentioned in the testimony which meet the description just given in any degree are laterals 2 and 3. There is not any finding that plaintiff Lowry has an interest in lateral No. 2, and such a finding cannot be implied, for there is not any evidence to support it, and, furthermore, it is not involved in this contro-

versy by the pleadings. The complaint describes but one lateral (No. 3) and one sublateral.

To the end that these parties may understand definitely their respective rights under the decree, a copy of the map (Defendant's Exhibit "A"), with the laterals numbered as in the diagram herein produced, should be attached to and made a part of the decree, and the first paragraph of the decree should be amended to read as follows: "It is hereby ordered, adjudged and decreed that the said plaintiff Emma M. Lowry is now the owner, in the possession and entitled to the possession and use, of an undivided one-half interest in the lateral ditches mentioned and described in her complaint, to-wit, lateral No. 3 and the sublateral shown upon the map hereto attached and hereof made a part, and has an easement in the land of the defendant through which said ditches run, said land of defendant being described as the south half of the northwest quarter of section 29, and the south half of the northeast quarter of section 30, township 12 north, range 7 east, in Meagher county, Montana."

The order overruling the motion for a new trial is affirmed. The cause is remanded to the district court, with directions to modify the findings and decree in accordance with the views herein expressed, and, when so modified, the decree will stand affirmed. Each party will pay his own costs of these appeals.

*Modified and affirmed.*

MR. CHIEF JUSTICE BEANTLY and MR. JUSTICE PIGOTT concur.

POWER MERCANTILE CO., APPELLANT, v. MOORE MERCANTILE CO. ET AL., RESPONDENTS.

(No. 3,948.)

(Submitted December 19, 1918. Decided December 30, 1918.)

[177 Pac. 406.]

*Crops—Mortgages—Chattels Personal—Landlord and Tenant—  
Tenant by Sufferance—Tenant at Will—Severance of Crops—  
Injunction.*

Real Property—Execution Sale—Purchaser—Right to Possession.

1. *Semble*: It would seem that the purchaser of land at execution sale is, as against the execution debtor, entitled to possession during the period of redemption.

Crops—Chattels Personal.

2. Crops of wheat, oats, *etc.*, are emblements—*fructus industriales*—and as such are usually treated as chattels personal, subject to sale or mortgage, and levy of attachment or execution, even while still annexed to the soil.

[As to crops or growths which are subject to execution as personalty, see note in 55 Am. Dec. 161.]

Same—Not Real Property—Statutes.

3. Crops of the character above mentioned are not included within the definition of "real property" declared by sections 4424-4429, Revised Codes, because attached to land by roots, or incidental or appurtenant to it.

Same—Sale of Realty—Effect.

4. Where the owner of land sells it with right of immediate possession in the purchaser and without reservation of the crops then standing thereon, and the purchaser takes possession before severance, title to the crops passes with title to the land.

Same—Tenant by Sufferance—Definition.

5. A tenant by sufferance is one who, as the result of the owner's neglect or laches, wrongfully remains in occupancy after his right to possession has ended.

Same—Tenant by Sufferance—Title to Crops.

6. The crops which a tenant by sufferance (or a trespasser) plants, cultivates and harvests during his wrongful occupancy are his as against the person entitled to possession of the land.

Same—Tenant at Will—Title to Crops.

7. A tenant at will, being rightfully in possession with the landlord's or owner's express or implied consent, may, unless he holds over wrongfully, at the end of his tenancy harvest the crops sown and cultivated by him during his occupancy.

Same—Mortgagor Holding Over—Title to Crops.

8. Where a mortgagor of farm lands sold on foreclosure holds over after the expiration of the period of redemption and the issuance of the sheriff's deed, he becomes a tenant by sufferance and as such owns

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On the question of right of tenant at will to crops, see note in 41 L. E. A. (n. s.) 404.

[5] when the work was done. The owner of land ought not to have it subjected to the burden of a servitude for a public street over it unless the evidence presented to establish the claim to it is clear and convincing. The evidence submitted by the defendant does not meet this requirement.

The judgment and order are reversed, and the district court is directed to find for the plaintiff and render a decree accordingly.

*Reversed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE PIGOTT concur.

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LOWRY ET AL., RESPONDENTS, v. CARRIER, APPELLANT.

(No. 3,956.)

(Submitted December 5, 1918. Decided December 30, 1918.)

[177 Pac. 756.]

*Waters and Water Rights—Ditches—Easements—User—Abandonment—Evidence—Adverse Possession—Prescription—Complaint—Incompatible Claims—Equity.*

**Waters and Water Rights—Ditches—Easements—Extent of User—Evidence.**

1. The extent of an easement acquired by adverse user is measured by the extent of the use; hence evidence of the amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible.

[As to what constitutes appropriation of water, see note in 60 Am. St. Rep. 799.]

**Same—Ditches—Public Lands—Easements.**

2. Entry men on public lands over which irrigating ditches had theretofore been constructed under the right conferred by sections 2339 and 2340, United States Revised Statutes, take the lands burdened with the easement thus granted.

**Same—Ditches—Nonuser—Abandonment—Evidence.**

3. Evidence of limited use or nonuser of an irrigating ditch is not alone sufficient to establish abandonment.

**Same—Pleading—Complaint—Incompatible Theories.**

4. A party may in his complaint present his claim to the use of irrigating ditches in different counts, each founded upon a different theory to meet the exigencies of the case as disclosed by the evidence, provided the theories are not incompatible.

**Same—Adverse Possession—Prescription—Incompatible Theories.**

5. Since use of one's own property cannot be "adverse" within the meaning of that term as used in the law of prescription, assertion of title to an easement over public lands granted by the federal government under sections 2339 and 2340, United States Revised Statutes, for ditch purposes, and claim of the same right under title by prescription thereafter acquired were incompatible, in the absence of abandonment.

**Same—Equity—Decree Based on Incompatible Theories—Review.**

6. Under section 6253, Revised Codes, the supreme court will in an equity case, the decree in which was founded upon incompatible theories, dispose of the cause on its merits, all the evidence being presented in the record, by eliminating from the decree findings based upon the erroneous theory, and adopting those founded upon the correct one supported by the evidence.

**Same—Ditches—Ownership—User—Evidence.**

7. The owner of a ditch right cannot be compelled to surrender it merely because its function can be performed by another ditch owned by him and not in dispute; hence evidence tending to show that all his irrigable land could be watered from a ditch other than the one title to which was at issue, was inadmissible.

**Same—Ditches—Ownership—Change of Boundary Lines.**

8. Title to a ditch constructed on what was unsurveyed public land at the time of its construction, was not affected by a change in boundary lines wrought by the official survey, causing a portion of the ditch to fall within the lines of an adjacent owner.

*Appeal from District Court, Meagher County; John A. Matthews, Judge.*

SUIT by Emma M. Lowry and others against Frank C. Carrier. From a judgment for plaintiff and an order denying a new trial, the defendant appeals. Modified and affirmed.

*Mr. E. K. Cheadle and Messrs. Ford & Linn*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

*Messrs. Wash, Nolan & Scallon*, for Respondents, submitted a brief; *Mr. C. B. Nolan* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This suit was instituted to have determined the relative rights of the parties to certain irrigating ditches. Plaintiffs prevailed, and defendant appealed from the judgment and from an order denying his motion for a new trial.

found no decision where, as in Montana, the legal title vests upon sale, subject only to be defeated by redemption, that holds contrary to our contention.

*Mr. Charles J. Marshall* and *Mr. Merle C. Groene*, for Respondents, submitted a brief; *Mr. Marshall* argued the cause orally.

The position of respondents is as follows: That at the time of the execution sale, appellant became the owner of the land in question, subject only to said Samuell's right to the possession of said lands until the time for redemption had expired and sheriff's deed delivered to appellant; that Samuell was rightfully in possession of the premises during his redemption period, under obligations to pay rent therefor to appellant, and as a tenant for years or at will, and under the terms of our statutes he had the absolute right to plant and harvest all crops he raised upon the lands while he was thus rightfully in possession thereof; that in such case he had the absolute right to harvest, cut and remove the crops from the lands after the redemption time had passed; and it naturally follows that he could give a valid chattel mortgage upon the growing crops.

We think no question can be raised as to Samuell's right to remain in possession of the lands sold from the time of sale until the time for redemption had passed. (*Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454; *Harris v. Reynolds*, 13 Cal. 516, 73 Am. Dec. 600; *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 724; sec. 6842, Rev. Codes 1907.) On the basis of Samuell being in possession of the lands as one who has a right to repurchase the property on a certain and definite contract, as stated by this court in *McQueeney v. Toomey*, 36 Mont. 296, 122 Am. St. Rep. 358, 13 Ann. Cas. 316, 92 Pac. 561, we find the following: "As to the ownership of crops subsequently grown, the relation of the vendor and a purchaser in possession, under a contract of sale, is said to be analogous to that of landlord and tenant or of mortgagee and mortgagor in possession. Accordingly the purchaser is the owner of the crops grown upon the land during

the time he is rightfully in possession thereof." (39 Cyc. 1627; *Killebrew v. Hines*, 104 N. C. 182, 17 Am. St. Rep. 672, 10 S. E. 159, 251.)

The case of *Yeazel v. White*, 40 Neb. 432, 24 L. R. A. 449, 58 N. W. 1020, while different from the case at bar to the extent that the statute in Nebraska gives the debtor the legal title to the land until redemption has expired, yet is in point, because in both that case and the one at bar the debtors were entitled to the possession of the land.

In *Monday v. O'Neil*, 44 Neb. 724, 48 Am. St. Rep. 760, 63 N. W. 32, the question is squarely presented and the court decides that the tenant of the execution debtor and the debtor himself are entitled to the growing crops.

MR. JUSTICE PIGOTT delivered the opinion of the court.

Claiming ownership and right to possession in itself of crops of wheat and oats severed from certain lands owned by it but not in its possession, plaintiff commenced this action seeking a perpetual injunction restraining defendants from interfering with plaintiff's control and use of the crops and from selling them, and praying also for an injunction *pendente lite*. The complaint states the facts to be in substance these: On and prior to June 3, 1914, one Samuell was the owner and in possession of certain lands, and on that day his interest was sold to plaintiff under writ of execution issued upon a money judgment against him. No redemption from the sale having been made within the year expiring on June 3, 1915, the sheriff on June 7 following made his deed to plaintiff granting to it the land so sold with the appurtenances. At these times crops of wheat and oats were growing upon the land and the title to these crops passed to plaintiff by virtue of the law and the sheriff's deed. Ever since June 3, 1915, plaintiff has been and is now entitled to possession of the land and crops, but defendant company, knowing at all times of the rights of plaintiff, in December, 1914, took from Samuell a chattel mortgage of the crops then growing and to be grown on the land, which it is proceeding to foreclose. and to that end has delivered a copy of

the mortgage to defendant sheriff who has advertised for sale and, unless enjoined therefrom, will sell, the crops which were attached and appurtenant to the land on June 3, 1915, and has wrongfully entered upon the land and removed a part of the crops. As will be observed, the complaint does not state who planted the crops, but the presumption is that Samuell who was in possession of the land did so. Nor does the complaint expressly state that Samuell was in actual possession of the land and crops subsequently to June 7, 1915; but it is pregnant of the inference that plaintiff has never had actual possession and that either Samuell himself or some person claiming under him has always been in occupancy of the land and possession of the crops, and harvested the latter when they matured. We understand the parties so to construe the complaint.

In response to an order to show cause why an interlocutory injunction should not be granted upon the complaint, defendant demurred for want of substance, and further objected because plaintiff had an adequate remedy at law. The court below refused to order an injunction *pendente lite*, and plaintiff appeals.

Upon the facts thus stated, we do not find it necessary to decide the question whether or not under the statutes of Montana, notably sections 6836, 6842, 6843, 6877 and 6879 of the Revised [1] Codes, and the holding in *McQueeney v. Toomey*, 36 Mont. 282, 122 Am. St. Rep. 358, 13 Ann. Cas. 316, 92 Pac. 561, the purchaser at execution sale of land of the execution debtor, is entitled, as against the debtor, to possession during the period of redemption. This question was reserved in *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717. The members of this court are inclined strongly to the opinion that the purchaser is entitled to such possession. Since, however, the parties assert and insist that no such right exists and that the execution debtor may remain in possession until the sheriff's deed issues, and since the conclusion which we have reached on the merits could not be changed were the contrary rule adopted, we shall proceed upon the theory advanced by the parties themselves.



The single ultimate question that we shall consider is that of ownership of the crops. If Samuell is the owner, the complaint does not state facts sufficient to constitute a cause of action. We need not make further reference to defendant company which, as mortgagee, is threatening to take and sell the crops, for its right is derivative and depends for existence upon Samuell's ownership,—the company, as mortgagee, has as much right to take and sell the crops as Samuell would have if the mortgage had not been made, and we need not decide whether the mortgagee has a greater right. We put defendants in the shoes of Samuell.

When stripped of averments not pertinent to the question of ownership of the crops, the complaint shows that Samuell owned and was in possession of land which was sold to plaintiff at execution sale on June 3, 1914, and that Samuel has always remained in actual possession; that the property has never been redeemed from the sale; that the year for redemption expired on June 3 and the sheriff's deed was made on June 7, 1915; that during the period of redemption Samuell had sowed the land in wheat and oats, and these were growing on the land when the redemption period expired and the sheriff's deed was executed; that he cultivated the crops and, when they were fit for harvest, severed them from the soil and has never parted with possession of them.

Wheat and oats are emblements,—*fructus industriales*,—for [2] they are crops produced by the labor of man and are fruits of his industry; his planting, cultivation, and harvesting are yearly and the crops "essentially owe their existence to" his labor; the purpose of the planting "is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended." Such crops are usually regarded and treated as chattels personal, subject to sale or mortgage, and levy of attachment or execution, as other chattels are, even while still annexed to the soil. (*Sparrow v. Pond*, 49 Minn. 412, 32 Am. St. Rep. 571, 16 L. R. A. 103, 52 N. W. 36; *Commonwealth v. Galatta*, 228 Mass.

308, 117 N. E. 343; *Raventas v. Green*, 57 Cal. 254; Chapter 86, sec. 16, Session Laws of Montana of 1913.) Crops of this character are not included within the definition of real property declared by sections 4424-4429 of the Revised Codes (*Bjornson v. Rostad*, 30 S. D. 40, Ann. Cas. 1915A, 1151, 137 N. W. 567), although a casual reading of section 4427 might suggest that such crops are deemed to be affixed to land because attached to it by roots, and a like reading of section 4429 might suggest that they are incidental or appurtenant, in the technical sense, to land; but section 4427, so far as it refers to roots, vines, and shrubs, is intended to include the things produced essentially by the powers of nature only, viz.: *fructus naturales*, as distinguished from *fructus industriales*; and section 4429 does not, strictly speaking, embrace things such as annual crops produced by industry, for they are not used with the land for its benefit, the section dealing with rights of way and the like, which are servitudes upon other land and easements attached to the land benefited, as is disclosed also by section 4507. Crops of wheat and oats while growing are of necessity physically attached to land and accessory to its enjoyment, and for that reason and in that sense, and for certain purposes, are in a variety of circumstances incidental and accessory to land; for example, [4] where the owner of land sells it with right of immediate possession in the purchaser, and without reservation of the emblements then standing on the land, and the purchaser takes possession before severance, title passes to the emblements as well as to the land, the reason, as it should seem, being that the grantor's intrusion by re-entry, and his cultivating and harvesting of the crops would be both a breach of the covenant of quiet enjoyment and a trespass upon and disturbance of the purchaser's possession, and in that event "the anomalous situation would be presented of the ownership by one of personal property upon the land of another without right in the owner to enter and take it." (*Herron v. Herron*, 47 Ohio St. 544, 21 Am. St. Rep. 854, 9 L. R. A. 667, 25 N. E. 420.) Whatever

the reason for the rule may be, the law on this subject is well settled.

So likewise, when by virtue of a decretal or execution sale, title to land becomes vested in the purchaser with right to present possession, title to annual crops sown by the former owner and then growing on the land passes, *sub modo*, to the purchaser and continues in him unless and until such ownership is lost, and one of the ways by which his *sub modo* ownership may be brought to an end is the occupation of the land by a tenant at sufferance who planted and cultivated the crops, and harvested them when ripe, and thus appropriates to himself, as owner, that which has now become detached from the soil and ceased [5] to be incidental or accessory to the land or the enjoyment of it. A tenant by sufferance is one who wrongfully remains in occupancy after his right to possession has ended. He holds over as the result of the owner's neglect or laches. He has the mere occupancy or actual possession without any title to the land or any estate in it; he is not in privity with the owner who may re-enter when he pleases and so terminate the tenancy with- [6] out notice. While he is not entitled to gather crops which he had sowed but which he did not reap during his wrongful occupation, still "until the determination of his tenancy he is not a trespasser, and the crops he severs and gathers while his tenancy continues are his as against" the landlord or owner entitled to possession. (*Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39.) The same rule, it may be remarked, applies to a trespasser who plants, cultivates and harvests annual crops. (*Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Lynch v. Sprague Roller Mills*, 51 Wash. 535, 99 Pac. 578.) A tenancy by sufferance may be converted into one at will, and this change results, for example, when the owner who is entitled to possession permits the tenant by sufferance to retain possession in such circumstances as are inconsistent with the tenant's wrongful holding and show implied consent to his continuing possession.

As to a tenant at will, a situation somewhat different is pre- [7] sented, for he is a tenant rightfully in possession with the

landlord's or owner's express or implied consent; and his occupation does not become wrongful until he holds over after his tenancy is determined, which termination may in Montana be accomplished and re-entry made by the landlord's giving notice and taking the steps prescribed by statute. (Rev. Codes, secs. 4502-4504.) Unless he becomes a wrongdoer by holding over (in which event it should seem that thenceforth he would be a tenant by sufferance) he may take the annual products of the soil, and may cultivate and harvest the crops growing at the end of his tenancy. (Rev. Codes, sec. 4519.) He is, therefore, at all times the owner, as against the landlord, of the crops, whether growing or severed.

To the facts of the instant case we apply these long-established principles of law,—principles from which there is [8] little, if any, dissent; and in making the application we assume as correct the theory of the parties that although the execution sale on June 3, 1914, transferred to plaintiff the legal title of Samuell to the land, leaving in Samuell simply the personal privilege to redeem (*McQueeney v. Toomey*, 36 Mont. 282, 122 Am. St. Rep. 358, 13 Ann. Cas. 316, 92 Pac. 561, *supra*; *Hamilton v. Hamilton*, 51 Mont. 509, 154 Pac. 717, *supra*), yet plaintiff had no right to possession until the sheriff's deed was made on June 7, 1915. Upon this theory plaintiff had the right on June 7, 1915, to immediate possession of the land and the crops which Samuell had planted thereon while in lawful possession, and which were then growing. At once upon the making of the sheriff's deed Samuell became tenant by sufferance, for he continued in possession wrongfully. Plaintiff could have brought that tenancy to an end, without notice, by re-entry, and if it had done so prior to severance of the crops it would have thereby perfected its title to, and have become the owner of, the crops. But it permitted by supineness, or neglect, or laches, Samuell to cultivate and gather the crops. Hence Samuell, and not plaintiff, is the owner of them. The fact that the crops were planted by Samuell before his occupancy became wrongful, is of no moment. This, we think, is clear upon prin-

ciple; and it finds direct support in *Lyons v. Adel*, 39 S. D. 317, 164 N. W. 56, where the precise question was decided. There, as here, the seeds for the crops were sown by the former owner during the year allowed to him for redemption; he was permitted to remain in actual possession of the land sold, and to harvest the crops after the redemption period had expired and the sheriff's deed executed. The court said, in substance, that the rule is well established that a mortgagor holding over after the expiration of the period of redemption and the issuance of the sheriff's deed, is a tenant by sufferance and as such is the owner of the crops which he has planted, grown, and harvested while in possession of the land, holding the facts of the case then before the court to be within the general rule that crops planted upon land by a mere intruder are the property of the owner of the land, so long as the crop remains unsevered, but that when the crop which had been so planted and cultivated has been severed from the soil by the intruder during his wrongful possession, he himself is entitled to the crop as against the owner of the land, and this whether he came into possession of the land lawfully or not, "provided he remains in possession till the crop is harvested."

In our opinion, Samuell was a tenant by sufferance. But if he was, according to the common law, a tenant at will, or if section 4481—designating estates at will as comprising one of four classes of estates in real property "in respect of the duration of their enjoyment"—has the effect of destroying estates by sufferance as known at common law, and making them estates at will (which we think unlikely), the result so far as the question of ownership is concerned must be the same. In that event, Samuell, as tenant at will, would be entitled, as has been shown, to rights greater than those possessed by a tenant by sufferance; for he would own the annual products of the soil, whether severed or not, and might have cultivated and harvested the crops growing at the end of his tenancy.

Plaintiff is not, however, without remedy. If Samuell was a [9] tenant at will he is liable *ex contractu* for rent *eo nomine*;

if he was a tenant by sufferance he is at least liable *ex delicto* under section 6069 of the Revised Codes, for a sum equal to the value of the use and occupation of the land during his wrongful possession of it. (*Leyson v. Davenport*, 38 Mont. 62, 98 Pac. 641.)

Since the complaint fails to show that plaintiff has any right or title to the crops, consideration of the objection to the complaint on the ground that it does not state facts sufficient to invoke injunctive relief were plaintiff the owner, need not be determined, and that question also is reserved.

The order refusing to grant an injunction *pendente lite* is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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READ ET AL., RESPONDENTS, v. LEWIS AND CLARK COUNTY, APPELLANT.

(No. 3,982.)

(Submitted January 7, 1919. Decided January 20, 1919.)

[178 Pac. 177.]

*Taxation—"Credits"—Option Contracts—Appeal and Error—Agreed Statement of Facts—Conclusiveness—Evidence.*

Appeal and Error—Agreed Statement—Extent of Review.

1. In a cause decided by the district court upon an agreed statement of facts (Rev. Codes, sec. 6769), the office of the supreme court on appeal goes no further than to ascertain and determine whether the trial court drew the correct inference from the facts stipulated and rendered the proper judgment.

Agreed Statement—Conclusiveness.

2. Where an agreed statement of facts disclosed that a written contract involving the transfer of real and personal property was under-

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For a review of authorities discussing the question as to whether an amount due under contract for the purchase of land, not evidenced by a note or purchase money mortgage, is a credit subject to taxation, see note in 17 L. E. A. (n. s.) 1220.

On the general rule that parol evidence is not admissible to vary, add to or alter a written contract, see note in 17 L. E. A. (n. s.) 270.

stood and intended by the grantor and grantees as granting a right to exercise an option to purchase, all others were concluded from asserting that the transaction constituted a sale.

**Taxation—Option to Purchase—"Credits."**

3. An option to purchase real and personal property created no indebtedness which could be enforced, and therefore, the amount due and unpaid under the contract was not a "credit" within the meaning of section 2501, Revised Codes, *viz.*, a solvent debt, which could properly be taxed.

**Contracts—Varying Terms—Rule—Exception.**

4. The rule declared by section 7873, Revised Codes, that in a controversy between the parties to a written contract or their privies, parol evidence cannot be introduced to vary, enlarge or contradict its terms, *etc.*, has no application in a controversy between a party to the contract and a stranger.

**Agreed Statement—Conclusiveness.**

5. An agreed statement of facts voluntarily made and submitted to the trial court is binding upon the parties and the court.

*Appeal from District Court, Lewis and Clark County; R. Lee Word, Judge.*

ACTION by Laura T. Read, individually and as executrix of the will of Francis S. Read, deceased, against Lewis and Clark County. From a judgment for plaintiff, defendant appeals. Affirmed.

*Mr. S. C. Ford*, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Jos. P. Donnelly*, for Appellant, submitted a brief; *Mr. Donnelly* argued the cause orally.

The weight of judicial authority is to the effect that such a contract as the one in question represents a taxable credit in the hands of the vendor. (*Dallas County v. Boyd*, 138 Iowa, 583, 17 L. R. A. (n. s.) 1220, 116 N. W. 700; *Griffin v. Board of Review*, 184 Ill. 275, 56 N. E. 397; *Tessier v. Nashua*, 75 N. H. 572, 78 Atl. 495; *Golden v. Munsinger*, 91 Kan. 820, 139 Pac. 379; *City of Marquette v. Michigan, I. & L. Co.*, 132 Mich. 130, 92 N. W. 934; *Nelson v. Breitenwischer*, 194 Mich. 30, 160 N. W. 626; *Clark v. Horn*, 122 Iowa, 375, 98 N. W. 148; *State v. Rand*, 39 Minn. 502, 50 N. W. 835; *Martin v. Wise*, 183 Ind. 530, 109 N. E. 745; *In re Assessment Aurora Gaslight etc. Co.* (Ind.), 113 N. E. 1012; *Beardsley v. Beardsley*, 138 U. S. 262, 34 L. Ed. 928, 11 Sup. Ct. Rep. 318.)

*Messrs. Wight & Pew*, for Respondents, submitted a brief; *Mr. Chas. E. Pew* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought under section 2742 of the Revised Codes, as amended by Chapter 135 of the Laws of 1909 (Laws 1909, p. 201), to recover of the defendant \$676.50, the amount of a tax paid to its treasurer under protest. Pending a hearing of the issue of law presented by a general demurrer interposed to the complaint, counsel for the respective parties prepared an agreed statement of facts and submitted the controversy for decision upon this statement. The court rendered judgment for plaintiff. Defendant has appealed.

Briefly stated, the facts are: On October 20, 1915, Francis S. Read died testate in Lewis and Clark county, leaving real estate in that county and also in Cascade county. On November 15 the plaintiff, a resident of Lewis and Clark county, was appointed and qualified as executrix of the will and entered upon the discharge of her duties as such. On June 2, 1916, she made out a statement or list of all property owned or controlled by her in any capacity, including all solvent credits belonging to her or the estate of deceased in her hands on the first Monday in March of that year, other than the real estate in Cascade county, verified it as provided by law, and delivered it to the assessor of Lewis and Clark county. Thereafter the assessor added to the list so made an item of \$30,000, claiming the same to be a solvent credit belonging to the estate of the deceased, and entered the list so amended upon the assessment-roll of the county for the year 1916. The basis of the claim of the assessor was the following: On April 26, 1909, Francis S. Read, the deceased, and Laura T. Read, his wife, entered into a contract with Thomas A. Grimes and Howard Pew, by the terms of which they agreed to sell and the latter agreed to buy the real estate described therein, situate in Cascade county, together with certain personal property used in connection therewith,



for the sum of \$46,000. Of this sum \$10,000 was to be paid upon the execution of the contract, and the balance of \$36,000 on or before the expiration of ten years thereafter, with interest payable annually at the rate of six per cent per annum, payment upon the principal to be made in installments at any time of not less than \$500. The Reads were to execute and deliver at once a bill of sale for the personal property. They were also to execute a warranty deed to the real estate, which, together with a copy of the contract, was to be deposited as an escrow with the Union Bank & Trust Company of Helena, to be delivered to Grimes and Pew upon payment by them to the bank of the balance of \$36,000, or upon a written acknowledgment, delivered to it by them, showing that payment had been made in full. Grimes and Pew were to have immediate possession both of the personal property and the land, and were to pay all taxes for the year 1909 and all thereafter levied. In case the buildings on the land should be insured either by the Reads or by Grimes and Pew, the amount paid on the policy on account of any loss was to be applied to the payment of the balance then due under the contract. The contract contains these provisions:

“It is further agreed that the failure of the said parties of the second part to make any payments of principal or interest, when the same shall become due as herein provided, shall not work a forfeiture hereof, unless such delinquent payment or payments shall not be made within sixty (60) days after written notice shall be served upon the said parties of the second part by the said parties of the first part to claim a forfeiture of this contract by reason thereof.

“It is further provided that, in the event this contract shall be forfeited as above provided, by failure of the second parties to make any such payment or payments within sixty (60) days, then and in that event said parties of the second part shall forfeit to said parties of the first part as liquidated damages, and as rental for the use and occupation of said premises, all payments made to said parties of the first part, or either of them, by said parties of the second part under the terms of this agree-

ment, and said parties of the second part shall in such case be subject to no further liability thereunder, and said bank shall thereupon redeliver said deed to said parties of the first part."

When the assessor added the item of \$30,000 to plaintiff's list, she applied by petition to the board of county commissioners, sitting as a board of equalization, to strike it out on the ground that it did not represent a solvent credit and was not subject to taxation. The board denied the application, on the ground that it was in doubt whether the item was a solvent credit. It was thereafter included in the amount of plaintiff's assessment for that year, and when the time came for the payment of taxes the plaintiff paid under protest the amount due thereon, at the rate of twenty-two and one-half mills, together with taxes on other property.

In the agreed statement of facts it was expressly stipulated: "That it was at the time of the execution of said contract the intention of the parties thereto that the parties of the first part thereto should have no recourse or remedy against the parties of the second part thereto in case of default by second parties in the making of any payments or the performance of any condition therein contained on their part to be performed, when payment or performance should be due, other than the forfeiture of moneys paid and of all future rights under said contract, and the retaking of possession of said land described in said contract, and that no judgment could be recovered against said parties of the second part, or either of them, on account of any default in making any such payments or in performing any such conditions above specified, but that the payment of said deferred portions of the purchase price should be and was optional with second parties thereto." Immediately after the execution of the contract Grimes and Pew took possession of the property. On the first Monday in March, 1916, a balance of \$30,000 had not been paid. In the last clause of the statement it was stipulated: "That the only question involved in this case for determination by the court is whether said balance of \$30,000 of the purchase price specified in said contract is taxable as a

credit." Our task, therefore, is limited to a determination of this one question.

Counsel for the defendant insist that the contract is, on its face, bilateral and enforceable by the plaintiff at her option, and hence that the unpaid balance represents money at interest, and is therefore a taxable credit, within the meaning of the statute. (Rev. Codes, sec. 2501.) On the other hand, counsel for plaintiff insist that the forfeiture clause in the contract provides the only remedy to which the plaintiff may resort in case of default by Grimes and Pew, and hence that the contract is not one of sale, but a contract for a sale, in the nature of an option, as defined by this court in *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; *Clark v. American Developing & Min. Co.*, 28 Mont. 468, 72 Pac. 978, and *Tyler v. Tyler*, 50 Mont. 65, 144 Pac. 1090, and hence that the unpaid balance is not a credit. The question thus presented is a new one in this state, though it has several times been considered by the courts of other states, the decisions presenting much conflict. The following are illustrative cases: *Dallas County v. Boyd*, 138 Iowa, 583, 17 L. R. A. (n. s.) 1220, 116 N. W. 700; *Griffin v. Board of Review*, 184 Ill. 275, 56 N. E. 397; *Tessier v. Nashua*, 75 N. H. 572, 78 Atl. 495; *McGregor v. Ireland*, 86 Kan. 426, 121 Pac. 358.

It will be noted, in passing, that the Kansas court considers contracts similar to the one in controversy here as having the nature of options, but nevertheless declares them taxable as representing valuable property rights; their value for this purpose depending upon the particular circumstances, and not upon the amount of the purchase price remaining unpaid.

It may be conceded that it is a debatable question whether the writing on its face imports a sale, or merely a contract for a sale. However this may be, the record presented to us, not only relieves us, but precludes us, from construing it to ascertain its real import. Section 6769 of the Revised Codes provides: "When any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attor-

neys, such statement shall have the effect of a special verdict or finding of facts, and judgment shall be pronounced thereon as upon a special verdict or finding of facts; and in such case no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement." Under this provision our office is ended when we have ascertained and determined whether the trial court drew the correct inference from the facts stipulated and rendered the proper judgment. (*Hale v. Jefferson County*, 39 Mont. 137, 101 Pac. 973.)

The statement discloses that the parties intended and understood that the Reads granted to Grimes and Pew only the right [2, 3] to exercise an option. Since this was their understanding and intention when they executed the contract, all other persons are concluded from asserting that it was other or different. The result is that it created no enforceable indebtedness due from Grimes and Pew to the Reads, and therefore the amount still due and unpaid is not a "credit," within the meaning of section 2501 of the Revised Codes, *supra*, viz., a solvent debt, secured or unsecured, owed by Grimes and Pew to the Reads. The judgment of the district court was therefore correct.

But counsel for the defendant insist that the agreed statement was an attempt by counsel to reform the contract, and, as it discloses nothing but the conclusion of the parties, it was not binding upon the district court, and should have been disregarded by it. In support of this contention they cite the case of *Rampton v. Dobson*, 156 Iowa, 315, 136 N. W. 682. As pointed out by Justice Evans in his dissenting opinion, in that case the conclusion announced by the court was in direct conflict with the earlier case of *In re Shields Bros.*, 134 Iowa, 559, 10 L. R. A. (n. s.) 1061, 111 N. W. 963, in which the contrary conclusion was reached upon a substantially identical state of [4] facts. In a controversy between the parties to a written contract or their privies, parol evidence cannot be introduced to vary, enlarge or contradict its terms, except when a mistake or

imperfection therein is put in issue by the pleadings or when the validity of the contract is the fact in dispute. (Rev. Codes, sec. 7873.) In a controversy between a party to the contract and a stranger, however, the rule does not apply. As against him, a party may assert that the agreement was other or different in any respect from that which the writing expresses. (*McMasters v. Insurance Co.*, 55 N. Y. 234, 14 Am. Rep. 239; *Massie v. Chatom*, 163 Cal. 772, 127 Pac. 56; *Pacific Biscuit Co. v. Dugger*, 42 Or. 513, 70 Pac. 523; *In re Shields Bros.*, *supra*; 17 Cyc. 750.)

But, aside from this consideration, it was competent under the statute, *supra*, for the attorneys representing the plaintiff and [5] the defendant to stipulate the facts. The stipulation having been voluntarily made and submitted to the court, counsel for defendant cannot be heard to urge the objection they now make.

The judgment is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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MORELAND, RESPONDENT, v. MONARCH MINING CO. ET AL.,  
DEFENDANTS; THE CENTRAL STATE BANK, APPELLANT.

(No. 3,995.)

(Submitted January 7, 1919. Decided January 20, 1919.)

[178 Pac. 175.]

*Attachment—Intervention—Rights of Third Party Claimants—  
Remedies—Statutes—Adoption from Other States—Presump-  
tions—Appeal—District Courts—Jurisdiction.*

Appeal and Error—Effect of Perfection of Appeal—District Courts—Jurisdiction.

1. After an appeal had been perfected by intervener from a judgment dismissing his complaint, the district court lost jurisdiction of the

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On right of third persons who claim property to intervene in attachment action, see note in 23 L. R. A. (n. s.) 536.

cause so far as his rights were concerned, and was without authority subsequently to decree that he was not entitled to any of the funds in controversy in the action in which he sought to intervene.

**Attachment—Intervention—Right of Third Party Claimant.**

2. A third party who claimed to own property which had been attached to secure any judgment which might be recovered in an action, had such an interest in the subject matter of the litigation as to entitle him under section 6496, Revised Codes, to intervene and have his rights determined.

**Statutes—Adoption from Other State—Presumptions.**

3. When a statute is adopted from another state, the presumption is that the legislature adopts the interpretation placed upon it by the highest court of the state from which it is adopted.

**Attachment—Intervention—Alternative Remedies—Effect.**

4. The fact that a party claiming an interest in attached property may have a remedy, after seizure or sale, under section 6673, Revised Codes, or by an action in conversion or replevin, does not deprive him of his right to intervene in the action in which the attachment was procured.

**Intervention—Purpose of Legislation.**

5. The purpose of section 6496, Revised Codes, permitting any person to intervene in an action if he has an interest in the subject matter in litigation, is to avoid circuity of action and multiplicity of suits.

[As to who may become interveners, see note in 15 Am. Dec. 162.]

*Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.*

ACTION by I. S. Moreland against the Monarch Mining & Milling Company, a corporation, wherein the Central State Bank of White Sulphur Springs intervened. From a judgment dismissing the complaint in intervention, and from a subsequent one for plaintiff for the amount claimed in his complaint, intervener appeals. Reversed and remanded.

Cause submitted on brief of counsel for Appellant.

*Mr. John A. Shelton, for Appellant.*

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This action was instituted by the plaintiff to recover from the Monarch Mining & Milling Company \$1,053.70 alleged to be due for money paid out for the use and benefit of the defendant at its special instance and request, and certain moneys in the possession of the American Smelting & Refining Company at

East Helena were attached to secure the payment of any judgment which might be recovered. Before the case was ready for trial, the Central State Bank of White Sulphur Springs filed a complaint in intervention claiming the attached property as its own. To this complaint a general demurrer was interposed and sustained, and, the intervener declining to plead further, a judgment was rendered and entered on September 2, 1916, dismissing the complaint. From that judgment the intervener appealed. Thereafter, on November 11, 1916, the default of the defendant, Monarch Mining & Milling Company, was entered, and a judgment rendered in favor of plaintiff for the amount claimed in his complaint. This second judgment further decreed that the intervener "do have and recover nothing in this action, and that it is not entitled to any of the funds in controversy." From that judgment the intervener likewise appealed.

1. It is elementary that when the appeal was perfected from [1] the judgment dated September 2, the district court lost jurisdiction of the cause in so far as the rights of the intervener were involved. (*Glavin v. Lane*, 29 Mont. 228, 74 Pac. 406; *Hynes v. Barnes*, 30 Mont. 25, 75 Pac. 523; *Molt v. Northern Pac. Ry. Co.*, 44 Mont. 471, 120 Pac. 809.)

2. It is the next contention of the Central State Bank that [2] it had the right to intervene and have its claim to the attached property adjudicated in the action by Moreland against the Mining Company. Section 6496, Revised Codes, provides: "Any person may, before the trial, intervene in an action or proceeding who has an interest in the matter in litigation, in the success of either of the parties, or an interest against both." The intervention thus sanctioned was unknown to the common law or to the ancient equity practice. It is distinctively of civil law origin, and was authorized in this country first by the early statutes of Louisiana, in which state the Code Napoléon constitutes the basis of jurisprudence. Those statutes are codified in the Louisiana Code of Civil Procedure of 1839, Articles 389-394,

and, in substance at least, were copied into the laws of California and other western states, including Montana.

The original statute in Louisiana limited the right of intervention to one who had an interest in the success of either party to the original action, but after the decision in *Brown v. Saul*, 4 Mart. (n. s.) 434, 16 Am. Dec. 175, the statute was amended and its provisions enlarged to include a person whose interest is antagonistic to both parties.

In 1820 the Louisiana court, without specific reference to the statute then in force, recognized the right of a third party to intervene and have determined his claim of ownership to the attached property. (*Lee v. Bradlee*, 8 Mart. (o. s.) 20.)

In *Brown v. Saul* above, the right of a mere contract creditor to intervene was denied, and in *Gasquet v. Johnson*, 1 La. 425, the same rule was applied to a junior attaching creditor. In *West v. His Creditors*, 8 Rob. 123, decided in 1844, the court reaffirmed the decision in *Lee v. Bradlee*.

These conclusions may have been influenced, to some extent at least, by other provisions of the Louisiana Code (Articles 395-399) not found in the statutes of California or Montana, but, whether they were or not, they reflect upon the state of the law at the time the Louisiana statutes were adopted by California.

Later, in *New Orleans C. & B. Co. v. Beard*, 16 La. Ann. 345, 79 Am. Dec. 582, the court definitely determined that judgment creditors of the defendant, who had junior liens upon the attached property by reason of their seizure of it under *feri facias* issued on their judgments, had such direct legal interests as authorized them to intervene in the attachment suit, citing Articles 389 and 390 as authority for the decision.

In *Cobb v. Depue*, 22 La. Ann. 244, *Clafin Co. v. Feibelman*, 44 La. Ann. 518, 10 South. 862, and *Commission Co. v. Bond*, 44 La. Ann. 841, 11 South. 220, the right of a junior attaching creditor to intervene was reaffirmed; and in *Field v. Harrison*, 20 La. Ann. 411, and *McCarthy v. Baze*, 26 La. Ann. 382, the



right of a third party, who claimed the attached property, to intervene was upheld.

In *Horn v. Volcano Water Co.*, 13 Cal. 62, 73 Am. Dec. 569, the right of a simple contract creditor to intervene in a mortgage foreclosure suit was denied, but judgment creditors having junior liens were permitted to intervene. Justice Field, speaking for the court, said: "The interest mentioned in the statute, which entitles a person to intervene in a suit between other parties, must be in the matter in litigation and of such a direct and immediate character that the intervener will either gain or lose by the direct legal operation and effect of the judgment" (citing *Gasquet v. Johnson*, and *Brown v. Saul*, above). However much this language may apparently restrict the meaning of the statute, that it was intended to be understood in the light of the facts of the case then before the court, and not otherwise, is apparent, for in *Davis v. Eppinger*, 18 Cal. 379, 79 Am. Dec. 184, judgment creditors of the defendant, with liens inferior to the attachment lien of the plaintiff, intervened, and their right to do so was upheld, Chief Justice Field concurring.

In *Speyer v. Ihmels*, 21 Cal. 281, 81 Am. Dec. 157, the question whether a junior attaching creditor has such interest as authorizes him to intervene was set at rest. The opinion by Justice Norton was concurred in by Chief Justice Field. The court said: "Although the interveners have not a claim to or lien upon any property which is the direct subject of litigation in this action, they have a lien upon property which is held subject to the results of the litigation, and which would be lost to the interveners if the original action should proceed to judgment and execution. If the case does not fall within the precise definition of the cases in which intervention takes place, as given in section 659, and as explained in the case of *Horn v. Volcano Waterworks*, 13 Cal. 62, it is substantially within the object provided for by that section, and as that is a law only regulating mode of procedure and not affecting rights of property, we think the interpretation given to it in the case of *Davis v.*

*Eppinger* should not be changed." The rule was again observed in *Coghill v. Marks*, 29 Cal. 673.

In *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111, the subject was again before the court, and was dismissed with the observation: "That, under our Code, an attachment or execution creditor has a right to intervene, and upon a proper showing defeat the lien of a prior attaching creditor, we regard as too well settled to need further discussion (*Davis v. Eppinger*, 18 Cal. 378, 79 Am. Dec. 184; *Speyer v. Ihmels*, 21 Cal. 280, 81 Am. Dec. 157; *Coghill v. Marks*, 29 Cal. 673; *Coffey v. Greenfield*, 55 Cal. 382)"—and this language was quoted approvingly in *McEldowney v. Madden*, 124 Cal. 108, 56 Pac. 783.

It would seem that if the interest of a junior attaching creditor is sufficient to authorize him to intervene, for the stronger reason should it be held that the interest of a third party, who claims to own the attached property, justifies him in intervening, and such was the holding in *Dennis v. Kolm*, 131 Cal. 91, 63 Pac. 141, in *Potlatch Lumber Co. v. Runkel*, 16 Idaho, 192, 18 Ann. Cas. 591, 23 L. R. A. (n. s.) 536, 101 Pac. 396, and in *Houston R. E. I. Co. v. Hechler*, 44 Utah, 64, 138 Pac. 1159. To the same general effect are the decisions from Washington. (*Langert v. Brown*, 3 Wash. Ter. 102, 13 Pac. 704; *Happy v. Prickett*, 24 Wash. 290, 64 Pac. 528; *Perkins v. Bailey*, 38 Wash. 46, 107 Am. St. Rep. 831, 80 Pac. 177.)

In Minnesota, New Mexico and Nebraska like statutory provisions were held to exclude from the classes of persons qualified to intervene the junior attaching creditor and the third party who claims the attached property. (*Lewis v. Harwood*, 28 Minn. 428, 10 N. W. 586; *Meyer & Son v. Black*, 4 N. M. (Johns.) 190, 16 Pac. 620; *Danker v. Jacobs*, 79 Neb. 435, 112 N. W. 579.) In other jurisdictions the courts have permitted the claimant of the attached property to intervene in the principal suit without referring his right to do so to any specific statutory provision. (See note, 18 Ann. Cas. 594.)

The statutes of Idaho, Montana, Utah and Washington are identical, and all were borrowed from California after the high-

est court of that state had placed its construction upon the corresponding provision, in *Speyer v. Ihmels* and *Coghill v. [3] Marks*, above. When our legislature adopts a statute from another state, the presumption will be indulged that it adopts, as a part of the statute, the interpretation theretofore placed upon it by the highest court of that state. (*Müller v. Müller*, 47 Mont. 150, 131 Pac. 23.)

From the date the writ of attachment is levied, the property seized is impressed with a lien (sec. 6687, Rev. Codes) which continues in force until judgment, and, if the judgment is in favor of the party procuring the attachment, the property is automatically subjected to sale in satisfaction of the judgment [4] (sec. 6675, Rev. Codes); and, while it is true that the seizure, or even the sale, of A's property for B's debt does not affect the title of the true owner who may proceed under section 6673, Revised Codes, or have his appropriate remedy in conversion or replevin, he is not required to pursue any of these courses, and the fact that he has an alternative remedy does not reflect upon his right to intervene. (*Coffey v. Greenfield*, [5] 55 Cal. 382.) It was for the purpose of avoiding circuitry of action and multiplicity of suits that section 6496 was enacted. (*Pollatch Lumber Co. v. Runkel*, above.)

Our conclusion is that the Central State Bank was entitled to intervene in this action.

The judgment of September 2, 1916, is reversed and the cause is remanded, with directions to overrule the demurrer to the complaint in intervention. The judgment of November 11, 1916, in so far as it assumes to adjudicate the rights of the intervener, is reversed.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

## LEE, APPELLANT, v. LEE ET AL., RESPONDENTS.

(No. 4,253.)

(Submitted January 7, 1919. Decided January 20, 1919.)

[178 Pac. 173.]

*Husband and Wife—Separation Agreement—Enforceability—  
Divorce—Alimony—Suit Money—Counsel Fees.*

Husband and Wife—Separation Agreement—When Binding upon Parties.

1. Under sections 3694-3696, Revised Codes, husband and wife may agree, in writing, to an immediate separation, making provision for the support of either of them, the mutual consent of the parties being a sufficient consideration; and if fairly made and executed, free from fraud or imposition, coercion or duress, courts will uphold and enforce such an agreement.

Same—Divorce—Alimony—Suit Money—Counsel Fees—Erroneous Allowance.

2. Where suitable provision had been made by the husband for the support of the wife, in a separation agreement, which among other things provided that it should constitute a full settlement of all property rights in case a divorce action should result, in which event the husband should not be required to pay the wife alimony, suit money or counsel fees, it was error for the court, in an action for divorce by the husband, to ignore the terms of the agreement and make allowances to the wife in all three particulars, in the absence of a pleading attacking the validity of the agreement on the ground of fraud, duress, etc., or one disclosing a defense to the action on its merits.

[As to validity of contract intended to facilitate procuring of divorce, see note in *Ann. Cas.* 1915A, 811.]

*Appeal from District Court, Big Horn County; Geo. P. Jones, Judge.*

ACTION for divorce by Walter O. Lee against Mayme Lee. From an order allowing defendant temporary alimony, suit money and counsel fees, plaintiff appeals. Reversed and remanded.

*Messrs. McIntire & Murphy*, for Appellant, submitted a brief; *Mr. H. G. McIntire* argued the cause orally.

Both parties were competent to enter into this agreement (Rev. Codes, sec. 3694), and they were also competent to agree,

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Authorities passing on the question of validity of agreement between husband and wife renouncing marital rights are collated in a note in 12 *L. R. A.* (n. s.) 848.

as here, "to an immediate separation, and may make provision for the support of either of them and of their children during such separation." (Sec. 3695.) The mutual consent of the parties is a sufficient consideration for such an agreement. (Sec. 3696; *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642.) It is the law that the power to award temporary alimony is dependent on the indigence of the wife. (Sec. 3681.) This she must aver and prove, and the burden of proof is on her. This has been directly adjudged by this court in the case of *Rumping v. Rumping*, 41 Mont. 33, 108 Pac. 10, and it is the general law. (See 1 R. C. L., pp. 894, 895; 25 L. R. A. (n. s.) 387; *Collins v. Collins*, 80 N. Y. 1; *Romaine v. Chauncey*, 129 N. Y. 566, 26 Am. St. Rep. 544, 14 L. R. A. 712, 29 N. E. 826, 6 L. R. A. 847, 12 L. R. A. (n. s.) 846, note L. R. A. 1916B, 922; *Collins v. Collins*, 80 N. Y. 1.)

The wife's adultery during the pendency of the suit has been held sufficient to warrant a revocation of an order allowing her alimony *pendente lite* even where committed prior to the allowance of the award but not discovered until thereafter. (1 R. C. L., p. 895; *Jennison v. Jennison*, 136 Ga. 202, Ann. Cas. 1912C, 441, 445, 71 S. E. 244; *Cariens v. Cariens*, 50 W. Va. 113, 55 L. R. A. 930, 40 S. E. 335; *Cole v. Cole*, 142 Ill. 19, 19 L. R. A. 811, 31 N. E. 109; 14 Cyc. 787; 2 Bishop on Marriage, Divorce and Separation, sec. 1320.) *A fortiori*, if the power to revoke exists, the right to deny the application must also exist.

In *Rose v. Rose*, 11 Paige (N. Y.), 166, cited with approval in *Collins v. Collins*, *supra*, it was held that after the provision had been made, as here, for the wife's support, the wife is not entitled to alimony *pendente lite* unless she and her trustee surrendered or offered to surrender the voluntary settlement.

*Messrs. Goddard & Clark and Mr. E. E. Enterline*, for Respondents, submitted a brief.

Alimony *pendente lite* rests in sound discretion of the trial court and is not reviewable unless there is an abuse of discretion. (*Bohnert v. Bohnert*, 91 Cal. 428-431, 27 Pac. 732;

*Rose v. Rose*, 109 Cal. 544, 42 Pac. 452.) Pending action for divorce the court may in its discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children or to prosecute or defend the action. (*Sharon v. Sharon*, 75 Cal. 1, 16 Pac. 345.)

An order granting alimony during the pendency of suit, counsel fees or necessary expenses during prosecution of suit will not be disturbed upon appeal unless it is made to appear that the trial court has been guilty of an abuse of its discretion. (*Rose v. Rose*, *supra*; *Mudd v. Mudd*, 98 Cal. 320, 33 Pac. 114.)

Unless it appears that the order for alimony *pendente lite* was made without any evidence or without opportunity on the part of the husband to be heard and that it is of such a character as on its face to be inordinate in amount, it must be assumed that the discretion of the trial court has been properly exercised. (*Rose v. Rose*, *supra*.) The wife will be presumed entitled to support in divorce proceedings unless it is shown by result of trial that her claim is forfeited. (*Newman v. Newman*, 69 Ill. 167; *Jenkins v. Jenkins*, 91 Ill. 167; *Foss v. Foss*, 100 Ill. 576; *Harding v. Harding*, 144 Ill. 588, 21 L. R. A. 310, 32 N. E. 206.) The trial court has jurisdiction in a divorce action to order the defendant husband to pay temporary alimony to the plaintiff wife, though issue of fact has not been joined and although there was a demurrer pending to the complaint which was afterward sustained. (*Langan v. Langan*, 91 Cal. 654, 27 Pac. 1092.)

The foregoing decisions from California are based on section 137 of the Civil Code of that state, which corresponds to our section 3677, Revised Codes.

MR. JUSTICE COOPER delivered the opinion of the court.

This is an appeal from an order allowing defendant in the divorce action instituted by Walter O. Lee against his wife, Mayme Lee, temporary alimony in the sum of \$125 a month, suit money to the amount of \$500, and the sum of \$750 as counsel fees.

The complaint filed by the husband on March 2, 1918, sets forth substantially: The residence of plaintiff for more than one year within the state immediately preceding the beginning of the action for divorce; the intermarriage of the parties on December 3, 1910; the nonbirth of any children; the agreement between them to live separate and apart, entered into on March 6, 1917; and the fact of so living from that date until the filing of the complaint, the basis of which is adultery. Defendant interposed a demurrer which still remains undisposed of.

On April 5, 1918, defendant served and filed her notice of application for temporary alimony for support and maintenance during the pendency of the action, in the sum of \$250 monthly; for the further sum of \$1,000 as suit money to defend the action; and for \$2,500 as attorney's fees to enable her to prepare her defense, or such other sum as the court might deem just and proper. The motion was supported by the affidavit of the defendant, in which she set forth, among other things, that she was wholly without means to defend the action or to employ counsel, or to pay the costs and expenses incident to the suit, and that she has no property of any kind whatever which could be utilized by her in her defense of the action or with which to properly support herself during its pendency. She also alleged that the plaintiff was possessed of property worth in the neighborhood of \$100,000, but made no mention of the separation agreement.

The application was heard upon the pleadings and certain oral and documentary evidence presented to us in a bill of exceptions.

The separation agreement provides, among other things, that plaintiff shall pay defendant the sum of \$10,000, to be evidenced by two promissory notes of \$5,000 each, in addition to \$100 per month from March 6 until November 1, 1917. It then concludes: "This agreement is a full and complete settlement of all property rights between the parties hereto as husband and wife, both now and after the death of either party to this agreement. From this time forward neither party shall

have any interest of any kind or nature in or to any property, real, personal or mixed of the other party to this agreement, whether now owned by such party or hereafter acquired. In case either party applies for a divorce, this agreement shall be a full settlement of all property rights in such divorce action, and neither party in such action shall have the right to obtain any part of the property of the other or require the party to pay attorney's fees, alimony or suit money on account of such action for divorce. In the future, neither party shall be under any obligation to support the other."

The plaintiff testified that his assets were of the approximate value of \$102,000, and that his liabilities amounted to about \$81,000. The defendant admitted the execution of the separation agreement, stating that under it she had received the sum of \$100 per month as provided therein. She further admitted that she still held the two notes for \$5,000 each, mentioned as part of the consideration for the agreement; that one of the notes had matured in November, 1917, and that the other would mature "this fall," meaning thereby the fall of last year; and that they provide for interest of eight per cent per annum from date. She also testified that she had not offered to return the money she had received for her support, but that she had used it to live on. As far as the record shows, until the filing of the complaint charging her with adultery, she expressed no dissatisfaction with the provision made for her in the separation agreement; and she gives no hint of any attempt whatever on the part of the plaintiff to take undue advantage of her in its execution.

The order of the court is sought to be impeached on the ground that it is not supported by the evidence, and is invalid in face of the separation agreement which is binding upon the parties. At the hearing below, the defendant objected to the introduction of the separation agreement "upon the ground that it was irrelevant, incompetent and immaterial, and for the further reason that the contract will be in controversy in the action, and that she intended to void its terms and conditions, and that



its introduction in evidence would involve the trial of her right to rescind and repudiate it, a matter which could not be determined in the proceeding." The court permitted its introduction on the assumption, apparently, that the allowance of alimony *pendente lite* was a matter confided to its discretion, notwithstanding the terms and provisions of the separation agreement, and made the order complained of. The question, therefore, presented to us for decision is whether the separation agreement was binding upon the parties and the court, or whether in the court was lodged the discretion to make the allowances irrespective of its provisions.

Our statutes (secs. 3694 and 3695, Rev. Codes) clearly recognize [1] the right of husband and wife to agree in writing to immediate separation, and to make provision for support of either of them. Section 3696 declares that the mutual consent of the parties is a sufficient consideration for such agreement. It seems now to be settled beyond cavil that agreements of this character, where it appears that they are fairly made and executed, free from fraud or imposition, coercion or duress, will be upheld and enforced. (*Galusha v. Galusha*, 116 N. Y. 635, 15 Am. St. Rep. 453, 6 L. R. A. 487, 22 N. E. 1114; *Parsons v. Parsons*, 23 Ky. Law Rep. 223, 62 S. W. 719; *Bailey v. Dillon*, 186 Mass. 244, 66 L. R. A. 427, 71 N. E. 538; *Winter v. Winter*, 191 N. Y. 462, 16 L. R. A. (n. s.) 710, 84 N. E. 382; *Walker v. Walker*, 9 Wall. 743, 19 L. Ed. 814.)

The case of *Galusha v. Galusha*, *supra*, was a case much like the one now before us. In that case Justice Parker, speaking for the New York court of appeals, said: "The trial court apparently adopted the view that, inasmuch as the statute empowers the court to require the wrongdoing husband to provide for the support of the wife, it may permit the agreement to stand, and, in addition thereto, compel the defendant to pay such other or further sum as the surrounding circumstances suggest to be just. \* \* \* In view of the situation of the parties, the contract was, at the time of the execution, valid and binding upon all the parties thereto. The defendant had fully

performed on his part, and it would seem as if he were entitled to the protection which it was stipulated that full performance should give to him. \* \* \* This authority to protect the wife in her means of support was not intended to take away from her the right to make such a settlement as she might deem best for her support and maintenance. The law looks favorably upon and encourages settlements made outside of court, between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful, and the contract, without fraud or duress, is properly and voluntarily executed, the court will not interfere. To hold otherwise would be not only to establish a rule in violation of well-settled principles, but, in effect, it would enable the court to disregard entirely settlements of this character; for, if the court can decree that the husband must pay more than the parties have agreed upon, it is difficult to see any reason why it may not adjudge that the sum stipulated is in excess of the wife's requirements, and decree that the husband contribute a smaller amount."

The contract here in question is fair on its face. Defendant [2] was a free agent in entering into it. She was the best judge of what her needs were for her support, and the contract provides for them, and releases plaintiff from further liability therefor. It recites that on account of divers and sundry unhappy differences between the parties, which renders it impossible for them to live together as husband and wife, they agree that they will "from this day" live separate and apart. She was not obliged to enter into the agreement, and, for aught that appears in the record, she did so freely and voluntarily, and we see no reason why she should not be bound by it, in the absence of a proper pleading in which the validity of the separation agreement is attacked directly and a defense to the cause of action on its merits is disclosed.

Neither is there in the record any offer to restore what she has received under the provisions of the agreement; and she now stands in the position of having received and accepted benefits under a contract she is seeking to have declared null and

void, on nothing more substantial than the vagarious statements found in her testimony. This may not be permitted.

The court's discretion in the premises did not go to the extent of authorizing it to arbitrarily set aside the valid agreement of the parties because, in its opinion, one of them had agreed to accept from the other less than she ought to have done.

The case of *Stebbins v. Morris*, 19 Mont. 115, 47 Pac. 642, decided in 1897, is commented upon by counsel for both sides, and they seem to differ with regard to the views there expressed. There a separation agreement of similar import to the one now under discussion was the subject of controversy. The husband after making the agreement, refused to comply with its terms, and the wife brought suit against him for an accounting and to compel him to pay to plaintiff the proceeds derived from the sale of the product of certain oil wells covered by the agreement. The complaint in that case set forth the agreement in full, and on the face of it it appeared that the essential requirement (which will be found in the initial paragraph of the agreement involved here) was wanting. Defendant interposed a demurrer which was sustained, and from the judgment dismissing the complaint the appeal was taken. The following excerpt from the language of Justice Buck will suffice to make clear the distinction between that case and the instant one: "No intimation is contained in the complaint that there was any necessity or moving cause for the separation other than mere caprice or purely voluntary consent. There is no allegation under which any other evidence in respect to it could be presented to the court. The demurrer was properly sustained. Had the complaint properly set forth any urgency or reasonable necessity for the agreement, then, no doubt, a cause of action would have been stated. Had it properly averred that the plaintiff had been imposed upon or defrauded by her husband in respect to this agreement, such averments would no doubt have altered the phase of the situation and entitled the plaintiff to the relief demanded. But no such allegations appear."

The order is reversed and the cause remanded for further proceedings.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

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BOWN, APPELLANT, v. SOMERS, RESPONDENT.

(No. 4,313.)

(Submitted January 7, 1919. Decided January 27, 1919.)

[178 Pac. 287.]

*Injunction—Res Adjudicata—Successive Applications.*

1. Where a husband failed to appeal from an order denying him an injunction against his wife, to prevent her from enforcing a judgment she had obtained in a suit for separate maintenance, pending determination of his suit for annulment of the marriage, he was bound by it, and could not thereafter apply for the same relief, upon substantially the same state of facts, either in the suit for annulment or one instituted for the sole purpose of securing an injunction.

*Appeal from District Court, Missoula County; Theo. Lentz, Judge.*

INJUNCTION suit by Benjamin Bown against Kathryn Somers, otherwise known as Kathryn Caufield, or as Kathryn Bown. From an order denying the injunction plaintiff appeals. Affirmed.

*Messrs. Madeen & Russell*, for Appellant, submitted a brief; *Mr. Chas. A. Russell* argued the cause orally.

*Messrs. Mulroney & Mulroney*, for Respondent, submitted a brief.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

To avoid circumlocution the defendant will be referred to as Mrs. Bown. In August, 1915, plaintiff and defendant, with

the ostensible purpose, at least, of becoming husband and wife, procured to be performed for them a marriage ceremony. In December following, Mrs. Bown commenced an action against Bown for separate maintenance, and secured a judgment by the terms of which Bown was required to pay certain fees and costs and the sum of \$62.50 per month for the support and maintenance of Mrs. Bown. In February, 1917, Bown commenced an action against Mrs. Bown to have their purported marriage annulled on the ground, as he alleged, that at the time the ceremony was performed Mrs. Bown was the lawful wife of James T. Somers, which fact was unknown to Bown until after the rendition of the judgment in the separate maintenance suit. In that action Bown applied to the court for an injunction restraining Mrs. Bown from further enforcing the judgment in the separate maintenance suit until a final determination could be had in the suit for annulment. The application for injunction was denied, and no appeal was taken from the order. Mrs. Bown appeared in the annulment suit by demurrer, but before the issues were settled Bown commenced this action to secure an injunction having the same purpose as the one sought in the annulment suit. After a hearing, the injunction was denied, and Bown has prosecuted his appeal from the order.

The application for injunction in the annulment suit was based upon the complaint in that action which is made a part of the record in this case, and the application in this instance was made upon the complaint herein. There is no substantial difference in the facts disclosed by the two pleadings. The alleged fraud committed by Mrs. Bown at the time the marriage ceremony was performed, and the fact that the fraud was not discovered until after the rendition of the judgment in the separate maintenance suit constitute the foundation for the application in each instance.

A party may not make successive applications for injunction upon the same state of facts. There must be an end to litigation some time. When the injunction was denied in the annulment suit, Bown had his remedy by appeal (sec. 7098, Rev.

Codes), and, having failed to avail himself of that remedy, he became bound by the order. (*Wetzstein v. Boston & Mont. Co.*, 26 Mont. 193, 66 Pac. 943.) He may not again apply for the same relief upon the same facts, either in the same action or in another one instituted for that purpose. (*Maloney v. King*, 30 Mont. 414, 76 Pac. 939.)

It is unnecessary to consider other questions presented upon this appeal. The order refusing the injunction is affirmed.

The injunction pending appeal heretofore issued by this court is dissolved.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

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STATE, RESPONDENT, v. KUUM, APPELLANT.

(No. 4,264.)

(Submitted January 8, 1919. Decided January 31, 1919.)

[178 Pac. 288.]

*Criminal Law—Homicide—When Excusable—Accident—Pointing Firearm—Assault—Manslaughter—Malice—Presumptions—Insanity—Instructions.*

Homicide—When Excusable—Evidence.

1. To justify a finding that a homicide by shooting was excusable, under section 8299, Revised Codes, where defendant and deceased were strangers, the evidence must show that when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent.

Same—When Unintentional—Evidence.

2. Where, in a prosecution for homicide, the evidence showed that defendant and deceased were strangers and apparently friendly; that there was no swearing or threatening language used by either; that defendant was much intoxicated at the time; that deceased himself stated that the shot was an accident, and that there was no motive for the shooting, the conclusion follows that the killing was unintentional.

Pointing Loaded Firearm—Assault.

3. One who points a loaded firearm at another with the purpose of doing the latter an injury or putting him in fear, is guilty of

assault; if the pointing of the weapon is accidental and unaccompanied by any unlawful purpose or intent, the act is not a crime.

**Homicide—When Excusable—Jury Question.**

4. The question whether defendant while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by section 8299, Revised Codes, to render the killing excusable, was a question for the jury.

**Homicide—Negligent Handling of Firearm—Manslaughter.**

5. The negligent handling of a loaded firearm (or other dangerous agency) causing or contributing to the death of another person is involuntary manslaughter within the meaning of subdivision 2 of section 8295, Revised Codes.

[As to condition of mind of slayer which reduces murder to manslaughter, see note in 134 *Am. St. Rep.* 726.]

**Same—Evidence—Murder in Second Degree—Presumptions.**

6. Where the state establishes the killing of deceased by defendant, and there is no evidence tending to show circumstances of mitigation or to justify or excuse it, the presumption arises that the killing was prompted by malice and was murder in the second degree; and the burden thereupon is upon defendant to produce evidence sufficient to create a reasonable doubt of the existence of malice, if he would reduce the degree of homicide to manslaughter.

**Same—Manslaughter—Presumptions—Malice.**

7. Where the state's evidence tends to show that the homicide committed only amounts to manslaughter, the presumption of malice does not obtain, and the defendant may take advantage of the case as made by the state to reduce the homicide to manslaughter, and refrain from introducing any evidence.

**Same—Manslaughter—Defendant's Guilt—Withdrawing Question from Jury.**

8. Where the state's evidence made out only a case of manslaughter it was error to refuse defendant's request to withdraw from jury the question whether the evidence made out a case of murder.

**Same—Insanity—Proper Refusal of Instruction.**

9. Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the homicide, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity.

*Appeal from District Court, Mineral County; Theo. Lentz, Judge.*

ALEX KUUM was convicted of murder in the second degree, and from the judgment and an order denying a new trial he appeals. Judgment and order reversed and cause remanded.

*Messrs. Murphy & Whitlock*, for Appellant, submitted a brief; *Mr. A. N. Whitlock* argued the cause orally.

In the absence of any evidence aside from the shooting, assuming defendant fired the shot, there are only three possible

Codes), and, having failed to avail himself of that remedy, he became bound by the order. (*Wetzstein v. Boston & Mont. Co.*, 26 Mont. 193, 66 Pac. 943.) He may not again apply for the same relief upon the same facts, either in the same action or in another one instituted for that purpose. (*Maloney v. King*, 30 Mont. 414, 76 Pac. 939.)

It is unnecessary to consider other questions presented upon this appeal. The order refusing the injunction is affirmed.

The injunction pending appeal heretofore issued by this court is dissolved.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

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STATE, RESPONDENT, v. KUUM, APPELLANT.

(No. 4,264.)

(Submitted January 8, 1919. Decided January 31, 1919.)

[178 Pac. 288.]

*Criminal Law—Homicide—When Excusable—Accident—Pointing Firearm—Assault—Manslaughter—Malice—Presumptions—Insanity—Instructions.*

Homicide—When Excusable—Evidence.

1. To justify a finding that a homicide by shooting was excusable, under section 8299, Revised Codes, where defendant and deceased were strangers, the evidence must show that when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent.

Same—When Unintentional—Evidence.

2. Where, in a prosecution for homicide, the evidence showed that defendant and deceased were strangers and apparently friendly; that there was no swearing or threatening language used by either; that defendant was much intoxicated at the time; that deceased himself stated that the shot was an accident, and that there was no motive for the shooting, the conclusion follows that the killing was unintentional.

Pointing Loaded Firearm—Assault.

3. One who points a loaded firearm at another with the purpose of doing the latter an injury or putting him in fear, is guilty of



assault; if the pointing of the weapon is accidental and unaccompanied by any unlawful purpose or intent, the act is not a crime.

**Homicide—When Excusable—Jury Question.**

4. The question whether defendant while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by section 8299, Revised Codes, to render the killing excusable, was a question for the jury.

**Homicide—Negligent Handling of Firearm—Manslaughter.**

5. The negligent handling of a loaded firearm (or other dangerous agency) causing or contributing to the death of another person is involuntary manslaughter within the meaning of subdivision 2 of section 8295, Revised Codes.

[As to condition of mind of slayer which reduces murder to manslaughter, see note in 134 Am. St. Rep. 726.]

**Same—Evidence—Murder in Second Degree—Presumptions.**

6. Where the state establishes the killing of deceased by defendant, and there is no evidence tending to show circumstances of mitigation or to justify or excuse it, the presumption arises that the killing was prompted by malice and was murder in the second degree; and the burden thereupon is upon defendant to produce evidence sufficient to create a reasonable doubt of the existence of malice, if he would reduce the degree of homicide to manslaughter.

**Same—Manslaughter—Presumptions—Malice.**

7. Where the state's evidence tends to show that the homicide committed only amounts to manslaughter, the presumption of malice does not obtain, and the defendant may take advantage of the case as made by the state to reduce the homicide to manslaughter, and refrain from introducing any evidence.

**Same—Manslaughter—Defendant's Guilt—Withdrawing Question from Jury.**

8. Where the state's evidence made out only a case of manslaughter it was error to refuse defendant's request to withdraw from jury the question whether the evidence made out a case of murder.

**Same—Insanity—Proper Refusal of Instruction.**

9. Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the homicide, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity.

*Appeal from District Court, Mineral County; Theo. Lentz, Judge.*

ALEX KUUM was convicted of murder in the second degree, and from the judgment and an order denying a new trial he appeals. Judgment and order reversed and cause remanded.

Messrs. Murphy & Whitlock, for Appellant, submitted a brief; Mr. A. N. Whitlock argued the cause orally.

In the absence of any evidence aside from the shooting, assuming defendant fired the shot, there are only three possible

conclusions,—intentional killing, negligent killing, accidental or unintentional killing. The first, we submit, is fully rebutted by the facts; negligence will not be presumed, and if it should be, then the crime resulting from the negligent use of a gun would be manslaughter and not murder, and the court in that event should have sustained defendant's motion to withdraw the question of murder from the consideration of the jury. (Wharton's Criminal Law, p. 618; *State v. Stitt*, 146 N. C. 643, 17 L. R. A. (n. s.) 308, 61 S. E. 566.)

Under the evidence the defendant was entitled to have the issue of excusable homicide submitted to the jury. The following recent cases somewhat similar in character so hold: *McPeak v. State*, 80 Tex. Cr. 50, 187 S. W. 754; *Maldonado v. State*, 70 Tex. Cr. 205, 156 S. W. 647; *Fitzgerald v. State*, 112 Ala. 34, 20 South. 966; *Brock v. Commonwealth*, 33 Ky. Law Rep. 630, 110 S. W. 878.

The issue of insanity should be presented by instructions if there is any evidence on the point. (*Alberty v. State*, 10 Okl. Cr. 616, 52 L. R. A. (n. s.) 248, 140 Pac. 1025; *Litchfield v. State*, 8 Okl. Cr. 164, 45 L. R. A. (n. s.) 153, 126 Pac. 707; *Smith v. State*, 12 Okl. Cr. 307, 155 Pac. 699; *Duke v. State*, 61 Tex. Cr. 441, 134 S. W. 705.)

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for the State, submitted a brief; *Mr. Woody* argued the cause orally.

While the evidence, taken as a whole, may possibly fail to show that degree of premeditation and deliberation necessary to constitute murder in the first degree, yet unquestionably it does tend to show the existence of all of the essential elements necessary to constitute murder in the second degree, and this being so, while possibly the court should have withdrawn from the jury all consideration of the question of guilty or innocence of murder in the first degree, yet, the jury by its verdict having acquitted the defendant of murder in the first degree, failure to do so did not constitute reversible error. (*Morgan v. Territory*,

16 Okl. 530, 85 Pac. 718; *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *People v. Taylor*, 36 Cal. 255; *State v. Felker*, 27 Mont. 451, 71 Pac. 668, 671; *Shields v. State*, 149 Ind. 395, 49 N. E. 351.)

If the defendant in drawing and pointing the revolver at the deceased was committing an unlawful act, then the killing of the deceased was not homicide by misadventure, but was involuntary manslaughter. (*Ford v. State*, 71 Neb. 246, 115 Am. St. Rep. 591, 98 N. W. 807; *Williamson v. State*, 2 Ohio C. C. 292; *Williams v. State*, 83 Ala. 16, 3 South. 616; *State v. Emery*, 78 Mo. 77, 47 Am. Rep. 92.)

When a firearm is pointed or aimed by one person at another, or in the direction of another, and is discharged, killing the person at whom it is pointed or aimed, and there is no malice or intention on the part of the slayer to kill or injure, but there is carelessness and negligence on the part of the slayer, the homicide is not by misadventure, but is manslaughter. (*Murphy v. Commonwealth*, 15 Ky. Law Rep. 215, 22 S. W. 649; *Burton v. State*, 92 Ga. 449, 17 S. E. 99; *Cook v. State*, 93 Ga. 200, 18 S. E. 823; *Tharp v. State*, 99 Ark. 188, 137 S. W. 1097; *State v. Morahan*, 7 Penne. (Del.) 494, 77 Atl. 488; *Tyner v. United States*, 2 Okl. Cr. 689, 103 Pac. 1057; *State v. Vance*, 17 Iowa, 138, 139; *Minton v. Commonwealth*, 79 Ky. 461, 463; *State v. Morrison*, 104 Mo. 638, 16 S. W. 492; *State v. Grote*, 109 Mo. 345, 19 S. W. 93; *Meyers v. State* (Miss.), 23 South. 428; *Austin v. State*, 145 Ala. 37, 40 South. 989; *State v. Dugan*, 1 Houst. C. C. 563; *Woods v. State*, 137 Ga. 85, 72 S. E. 908; 1 Wharton's Criminal Law, 618; 13 R. C. L. 860.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant, Alex Kuum, was convicted of the crime of murder in the second degree and sentenced to a term of imprisonment in the state prison. He appeals from the judgment and an order denying him a new trial.

The first contention made in his behalf is that the evidence was insufficient to justify the verdict (1) in that, though that

introduced by the state showed that the defendant shot and killed the deceased, it also showed that the killing was accidental and therefore excusable; and (2) that, though it be conceded that the killing was not excusable, the evidence from any point of view did not justify a finding of any higher grade of homicide than involuntary manslaughter.

The killing occurred on October 1, 1917, at Sildix, a flag station on the Northern Pacific Railway in Mineral county, two or three miles from the Idaho state line. The defendant resided at Mullan, Idaho. He is a Russian from Esthonia, ignorant, of a low order of intelligence, and unable to speak the English language beyond a few words. On the morning in question he came by train to Sildix, arriving at about 11 o'clock. Several others arrived at the same time, all of whom were strangers to him. These were Finlanders, as were also all the others who were about the place during the day, including Godfried Peterson, the deceased. None of them spoke English well; nor did the defendant understand or speak the Finnish language. The defendant as well as the other witnesses gave their testimony through an interpreter. For this reason, and because of the fact that at the time of the shooting all of them were more or less under the influence of liquor and consequently that their recollection of what occurred was imperfect, it is difficult to gather a clear account of the incidents preceding and leading up to the killing. A cabin near the station owned by one Everett was occupied and used at the time by the witnesses Norman and Lebstadt as a boarding-house to accommodate those who worked in mining prospects in the mountains near by. Apparently it was used also as the headquarters for the conduct of an illicit trade in alcoholic liquors to be conveyed across the line into Idaho, as well as to furnish them by the drink to any one who cared to go there. The cabin consisted of two rooms besides a woodshed in the rear. The rooms were connected by a door. One of them was called a sitting-room. In it were two beds, one large and the other a small one, the former situated near the door leading out to the front. The other room

was used as a kitchen and eating-room. A door opened from the sitting-room into the woodshed. The small bed was near the door. As soon as the defendant reached the place he began to drink, and, in company with others, including the deceased, continued to do so until 4 or 4:30 o'clock in the afternoon. The deceased made his home at Sildix.

There is no evidence disclosing how he and the defendant became acquainted with each other, nor how they happened to be together at the time of the shooting. It does not appear that they had met before that day. A few minutes before the shooting they came into the sitting-room together. Both of them had been drinking, but were apparently friendly. Gus Sundberg, the only eye-witness of the shooting, was lying on the large bed. Ernest Carlson was sitting by him on the bed talking to him. The defendant and deceased were standing together talking, apparently discussing the quality of a revolver which the defendant had taken from his pocket. The few words overheard by Sundberg and Carlson were spoken in English. The only words Carlson heard were: "Liberty! We have no liberty." These were spoken by the defendant. The following excerpts from the testimony of Sundberg furnish the only explanation as to how the shooting occurred: "I seen him [Kuum] have a gun in his hand; he took it out of his pocket or had it in his hand. I don't know. He was holding it this way. As to how he was holding it, \* \* \* I will ask you to show me the gun. As far as I remember, I noticed the flash—he held it in this manner [indicating]. I didn't notice much. He was talking and doing some motion. I didn't pay attention, but I remember Godfried [the deceased] got hold of the business end and says, 'That gun ain't no good,' and I thought it was all over. And at that time I was talking too. I took my eye off, and I was talking to Carlson about leaving the place, and all at once I noticed this here motion, and all at once it went off. Q. Now I want to ask you just one other thing as to that, and we have to ask all of these things. After Alex had the gun up this way [illustrating] and Peterson had his hand over there and Peter-

son said, 'That gun wouldn't hurt anybody,' or 'shoot anybody,' or whatever it was, did Alex hold it down this way and then up this way [illustrating]? A. I noticed the motion distinctly. I took my eye off, and just as I looked back I noticed the motion. It was just a short-arm movement. I don't think it came from the pocket. I don't believe it ever went to the pocket. \* \* \* Yes, he [deceased] was backing away from him at the time he had hold of the gun, and Kuum was following him up, apparently. As to whether Peterson was pulling the gun or Kuum was pushing him, I didn't pay much attention. When I saw the gun they were perfectly still—they were perfectly still. I didn't hear any loud or violent talk between them. There was no loud talk. Q. Then, the last you saw before the fatal shot was fired, Peterson had hold of the gun barrel A. Previous to that. The next thing I saw, Kuum drawing the gun down on Peterson. I saw the actual explosion. I don't know where Kuum brought his hand from when the shot was fired; all I noticed was that short-arm movement. It is my impression that the shot, the explosion, seemed to be an answer to the challenge that the gun was no good; it followed the remark so fast—it came just after that remark. \* \* \* As to whether Peterson actually had hold of the end of this gun, or how, and being asked to illustrate, I will say that he was slipping around with his fingers like this [illustrating] and says, 'This is no good.' So that he didn't have hold of it as counsel for the state now has—not tight. \* \* \* As to the short-arm movement which I have illustrated, I couldn't say how Peterson was holding it, whether he had it up that way as you illustrate, or down. I took my eyes away just after that; and the next time I looked I saw Alex pull the gun on him with this short-arm movement that I have indicated. In answer to Mr. Murphy I said the gun went off. As to whether I meant that it went off while Peterson was holding the end like that and it was being held up like that by the other, no; I can't rightly answer that question. I have already illustrated that there was this movement of the arm; that is right. \* \* \* As to

whether they were fighting or quarreling, I thought they were more in a joshing way; I don't recall Kuum saying a word. As to whether there was a quarrel between them, that was all the talk there was. No, indeed, there was no swearing or threatening language. So far as I know, judging from all I saw previous to the shot being fired, they were as friendly as drunken people can be. Yes; that is very friendly. I believe they can be more friendly then than in any other condition."

The witness Carlson was sitting with his back toward the defendant and the deceased, and aside from the few words he heard defendant speak, his attention was not directed to them until, hearing the shot, he turned and saw the deceased fall, exclaiming "I am shot." He then saw defendant with the revolver in his hand. He had not seen it until that time. This witness had been drinking with the defendant. When the shot was fired he ran from the room. A few minutes later he returned with others, who seized the defendant and held him down for a few minutes on the small bed. We quote the following from his testimony: "They were not quarreling, and there was no loud talking. No; I did not see a gun in the hands of Kuum at that time. The first that I knew that there was a gun there at all was a shot that I heard fired. \* \* \* They were both pretty drunk. I thought they were good friends. So far as I could judge they were very friendly; that is true. \* \* \* Kuum was excited after the shot—after it was all over. He didn't seem to be excited before or angry. It was all after this occurred." The defendant and the deceased were both strangers to this witness.

The witness Charles Lattman passed through the room to the kitchen a few minutes before the shooting. He was sitting at the table eating when it occurred. As he passed through the room he saw the defendant and the deceased standing talking together. He heard the deceased say, "You shouldn't do that." At that time they seemed to be "good friends."

Dr. Fulscher, called from Saltese to attend the deceased, reached Sildix about 6:30 o'clock in the evening. He found de-

ceased suffering from a wound in his abdomen. After administering restoratives he questioned him. "I asked him if there had been a quarrel, and he said, 'No' he had not had any words at all, and I said, 'Did this man shoot you intentionally?' and he said, 'I think it was an accident.'" Later he questioned the deceased further, asking whether the shooting was an accident or not. The reply made was, "I guess he didn't like me." During the hour or more he was with him, the deceased did not "at any time make any expression of hostility toward Kuum at all. Mr. McKinley and I were questioning him together to get a statement, and he said, 'It was only an accident.'" "

McKinley was a deputy sheriff residing at Wallace, Idaho. He removed the deceased to Wallace, where he died during the night. While at Sildix he asked deceased "if there was any trouble, what the cause of the shooting was," and he said, "There was no trouble, no quarrel; he just pulled down and shot me."

This is all the testimony introduced by the state except that there was evidence tending to show that the defendant after he was released made some attempt to leave the neighborhood of Sildix and conceal himself. It was not contradicted in any substantial particular by the testimony of the defendant or any of his witnesses, the defendant himself not questioning the account given by Sundberg, the principal witness for the state. On the contrary, he stated that after he had taken two cups of whisky and hot water soon after his arrival at Sildix, he lost his memory entirely, and did not know what had occurred thereafter until later in the evening, when he found himself at Mullan, and was told by a friend there that he had shot a man. There was testimony to the effect that immediately after the shooting both defendant and deceased stated that it was an accident.

We do not think that the evidence required the conclusion as a matter of law that the homicide was the result of an accident, [1] and was therefore excusable within the meaning of section 8299 of the Revised Codes. Subdivision 1 of that section declares a homicide to be excusable "when committed by accident



or misfortune, in lawfully correcting a child or servant, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent." The defendant and the deceased were strangers. This being so, the homicide was excusable, if at all, under the last clause of the subdivision quoted. In other words, the evidence must have furnished the basis for the single inference that when the shot was fired defendant was engaged (a) in doing a lawful act; (b) by lawful means; (c) with usual and ordinary caution; and (d) without any unlawful intent. It is said by counsel that it may be as fairly inferred from the evidence that the deceased brought about his own death by taking hold of the revolver and pulling it, and thus causing the shot to be discharged, as that defendant discharged it. Taking into consideration the fact [2] that the defendant and the deceased were strangers; that they were apparently friendly; that there was no swearing or threatening language used by either; that the defendant was very much intoxicated at the time; that deceased himself said that the shot was an accident; and that there was no motive for [3] the shooting—we conclude that it was unintentional. If one person presents a loaded firearm at another, with a purpose to do the other an injury or put him in fear, he is guilty of doing an unlawful act, for it amounts to an assault. (*State v. Barry*, 45 Mont. 598, 41 L. R. A. (n. s.) 181, 124 Pac. 775; *State v. Papp*, 51 Mont. 405, 153 Pac. 279.) But if the pointing of the weapon is accidental, or if there is no purpose or intention to injure the other by putting him in fear or otherwise, the act is not unlawful, in the sense that it is a crime punishable by law.

This conclusion, however, does not render necessary the additional conclusion that the homicide was excusable. It was still a question to be resolved by the jury whether the defendant was exercising usual and ordinary caution in handling the revolver as he did. It is a possible inference from the witness Sundberg's account of the shooting that after the defendant took the revolver from his pocket he held it so that it was pointing toward the deceased, and that, if by any means it should

be discharged, it would almost surely injure him. The jury could conclude that the defendant was not in the exercise of the measure of caution or careful attention which the circumstances demanded. It is true that it is not clear whether, when the shot was fired, the deceased had hold of the revolver; but, assuming that he did retain hold of it until the shot was discharged, and assuming, further, that he pulled it in an effort to get possession of it or in order to make further examination of it, thus causing the discharge, there was still left room for the inference that the discharge would not have occurred if the defendant had not been careless in attempting to retain possession. However this may have been, it was the province of the jury to determine whether the killing was excusable. If it was [5] not excusable, it was involuntary manslaughter within subdivision 2 of section 8295 of the Revised Codes. The negligent handling of a dangerous agency such as a loaded firearm, causing or contributing to the death of another person, is involuntary manslaughter. (1 Wharton's Criminal Law, sec. 305; 1 McClain's Criminal Law, secs. 345, 349.)

The contention, however, that the evidence did not justify the finding of murder in the second degree is well made. Section [6] 9282 of the Revised Codes provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." Under this provision, the state having established the killing by the defendant, in the absence of any evidence tending to show circumstances of mitigation or to justify or excuse it, the presumption arises that the killing was prompted by malice and was murder in the second degree. If the prosecution then seeks to convict the accused of murder in the first degree, the burden is upon it to prove deliberation. So the burden would rest upon the defendant to produce evidence sufficient to create a reasonable doubt of the existence of malice

if he would reduce the grade of homicide to manslaughter. (*State v. Fisher*, 23 Mont. 540, 59 Pac. 919.) The burden cast upon the defendant would not at any stage of the trial be greater than this. (*State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep. 529, 59 Pac. 169; *State v. Fisher*, *supra*; *State v. Leahey*, 44 Mont. 354, 120 Pac. [7] 234.) When, therefore, the evidence of the prosecution itself, as here, tends to show that the crime committed only amounts to manslaughter, the presumption of the existence of malice does not obtain. When the evidence is in this condition the defendant may, if he chooses, take advantage of the case as made by the state and refrain from introducing any evidence. (*State v. Powell*, 54 Mont. 217, 169 Pac. 46.) As pointed out above, the evidence justifying the conclusion that the defendant fired the shot unintentionally, the conviction of murder cannot be sustained.

Counsel for the defendant requested the court to withdraw [8] from the jury consideration of the question whether the evidence made out a case of murder. In view of the condition of the evidence, the request should have been granted.

Counsel requested the court to submit to the jury the question [9] whether the defendant was insane at the time the shooting occurred. The requested instructions embody correct statements of the rules of law applicable when the defendant relies upon insanity as a defense. But we do not find any evidence in the record which required the question of defendant's mental condition to be submitted to the jury. There is nothing in the statement of any witness which had any necessary tendency to show that the defendant was impelled by any insane delusion or by any irresistible impulse; nor, except so far as his reason had been clouded and obscured by the intoxication resulting from his indulgence in drink during the earlier hours of the day, that he did not understand what he was doing. There was evidence tending to show that he suffered periodical attacks due to a diseased condition of his heart; but this did not tend to show that he was mentally irresponsible. At the time of the

shooting he had become very much intoxicated—so much so that, according to his own testimony, he did not afterward remember what was going on about him or what he himself did. But this did not tend to show a diseased mental condition; nor could it be alleged as an excuse for an unlawful act committed by him while he was in that condition. (Rev. Codes, sec. 8114.) If there had been any substantial evidence pointing to the conclusion that he was affected by a mental disease, it would have been the duty of the court to submit the question of his mental capacity. As there was not, the requested instructions would not have served any purpose other than to confuse the jury.

Several other contentions are made by counsel; but, as they are without substantial merit, we deem it unnecessary to give them special notice.

The judgment and order are reversed, and the cause is remanded, with directions to grant the defendant a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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DENNIS, COUNTY TREASURER, APPELLANT, v. FIRST NAT.  
BANK OF GREAT FALLS, RESPONDENT.

(No. 4,276.)

(Submitted January 9, 1919. Decided February 3, 1919.)

[178 Pac. 580.]

*Taxation—National Bank Stock—Power of State—Statutes—  
Invalidity.*

**Taxation—National Bank Stock—How Assessable.**

1. The stock of a national bank (like that of a state bank) is assessable at its full cash value, less the amount of property representing that stock which has been otherwise taxed.

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Authorities discussing the question of state taxation of national banks are collated in notes in 45 L. R. A. 737; 3 L. R. A. (n. s.) 584; 10 L. R. A. (n. s.) 947; L. R. A. 1916C, 386.

Same—National Banks—Shares of Stock.

2. The taxing power of the state with reference to a national bank is limited to a tax upon its real estate assessable to the bank, and to one upon its shares of stock assessable to the holders thereof.

Same—Bank Stock—Statute—Invalidity.

3. *Held*, that Chapter 31, Laws of 1915, amendatory of sections 2503–2505, Revised Codes, prescribing the mode of assessment of bank stocks, is invalid in so far as it provides that the *assessed* (instead of the actual) valuation of the bank's real estate shall be deducted from the total value of its capital stock, surplus and undivided profits.

*Appeal from Eighth District Court, Cascade County; H. H. Ewing, Judge.*

ACTION by Lee Dennis, Treasurer of Cascade County, Montana, against the First National Bank of Great Falls, Montana, for and on behalf of its stockholders. From a judgment for defendant, plaintiff appeals. Affirmed.

*Mr. Geo. A. Judson, Mr. H. R. Eickemeyer and Mr. La Rue Smith*, for Appellant, submitted a brief; *Mr. Frank Woody*, Assistant Attorney General, argued the cause orally.

The provisions of Chapter 31, Laws of 1915, apply to all banks or banking corporations within the state, so that there is no question of discrimination against national banks as such. (*Illinois Nat. Bank v. Kinsella*, 201 Ill. 31, 66 N. E. 338; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 30 L. Ed. 895, 7 Sup. Ct. Rep. 826; *First Nat. Bank v. Chapman*, 173 U. S. 205, 43 L. Ed. 69, 19 Sup. Ct. Rep. 407; *Talbott v. Board of County Commrs. of Silver Bow Co.*, 139 U. S. 438, 35 L. Ed. 210, 11 Sup. Ct. Rep. 594; *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440, 41 L. Ed. 1069, 17 Sup. Ct. Rep. 629.)

The only question to be determined in resolving the validity of the method of assessment provided for by Chapter 31 is, whether or not the methods of assessment directed by the statute amount to double taxation. It is clear that the method directed does not result in double taxation, for, as is pointed out in *Illinois National Bank v. Kinsella*, *supra*, the real estate is assessed to the bank while the shares of stock are assessed to shareholders, and each is a separate kind of property.

It remains, then, to determine merely whether any of the shares of stock of the respondent have been taxed which represent property of respondent, within the state, and is otherwise taxed; that is to say, whether any of the shares of stock taxed represent real property. The full cash value of real property of respondent represented by its capital stock is not the amount at which it carries its real estate upon its books, but is the amount at which the property would be taken in payment of a just debt due from a solvent creditor. (*Wells-Fargo & Co. v. Harrington*, 54 Mont. 235, 169 Pac. 463.) This is also the assessed value. The assessor could not assess it for more. And if he did not assess the balance as shares of stock, that portion would escape taxation altogether.

It has repeatedly been held that the deduction of the assessed value of real estate from the capital of the bank and assessment of the balance to shareholders is not invalid as constituting double taxation.

The Constitution and statutes of Utah as reviewed in the decision of the United States supreme court in *Commercial Nat. Bank v. Chambers*, 182 U. S. 556, 45 L. Ed. 1227, 21 Sup. Ct. Rep. 863), were substantially the same as those in Montana. The statute on assessment of bank stock provided for deducting from the value of the shares a sum in the same proportion to such value as the assessed value of the real estate of the bank bears to the whole amount of capital, surplus, reserve and undivided profits. This method of assessment was upheld as not constituting double taxation, and the court upheld the action of the assessor in refusing to deduct the assessed value of real estate located out of the state and owned by the bank. (See, also, *Crocker v. Scott*, 149 Cal. 575, 87 Pac. 102; 37 Cyc. 832.)

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Appellant, submitted a supplemental brief.

Section 2502, Revised Codes, requiring all property to be assessed at full cash value was in full force and effect when Chap-

ter 31 was passed, and it must have been the theory of the legislature in enacting such Chapter that the administrative officers would comply with the mandatory provision of section 2502, and that consequently the assessed value and the full cash value would be approximately the same. If the administrative officers had complied with the mandatory provision of this section and had assessed the real estate of the bank at its full cash value, it could not successfully be contended that Chapter 31 was unconstitutional. And this being true, the contention of respondent resolves itself into nothing more nor less than a contention that because the administrative officers have violated the mandatory and positive provisions of section 2502, such violations render Chapter 31 unconstitutional, a contention which merits no consideration whatever. (*Pullen v. Corporation Commission*, 152 N. C. 548, 68 S. E. 155; *Caldwell Land & Lumber Co. v. Smith*, 151 N. C. 70, 65 S. E. 641; *Valley Inv. Co. v. Board of Review*, 152 Iowa, 84, 131 N. W. 669; *Jenkins v. Neff*, 47 App. Div. 394, 62 N. Y. Supp. 321; affirmed in 163 N. Y. 320, 57 N. E. 408, and in 186 U. S. 230, 46 L. Ed. 1140, 22 Sup. Ct. Rep. 905; *In re First Nat. Bank County Commissioners*, 25 N. D. 635, L. R. A. 1915C, 386, 146 N. W. 1064; *Appeal of Barrett*, 73 Conn. 288, 47 Atl. 243; *Corporation Commission v. J. K. Morrison & Sons Co.*, 155 N. C. 53, L. R. A. 1915C, 380, 70 S. E. 1079; note to *State Board v. People ex rel. Goggin*, 58 L. R. A. 600; *Second Ward Sav. Bank v. Leuch*, 155 Wis. 493, 144 N. W. 1119, 1122; *Lippincott v. Lippincott*, 75 N. J. L. 795, 69 Atl. 502; *United States Elec. etc. Co. v. State*, 79 Md. 63, 28 Atl. 768; *Commonwealth v. Virginia, V. & T. Co.* (Va.), 66 S. E. 853; *Scandinavian American Bank v. Pierce Co.*, 161 Pac. 469.)

*Messrs. Cooper, Stephenson & Hoover*, for Respondent, submitted a brief; *Mr. Sam Stephenson* argued the cause orally.

The contention of respondent is that the county assessor of Cascade County violated the provisions of section 17 of Article XII of the Montana Constitution in the manner in which he

undertook to assess the property of the First National Bank and its stockholders. The language of the Constitution is: "But this shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

Notwithstanding the citation of numerous decisions, appellant has carefully neglected to cite the case of *Daly Bank etc. Co. v. Board of Commrs.*, 33 Mont. 101, 81 Pac. 950, which very lucidly construes the provisions of section 17, Article XII, and in fact contains a clear and concise decision upon the very point, and the only point of contention in this case. We call particular attention to the following language: "To the extent that the capital stock is represented by property belonging to the state bank or trust company, and which property is liable to taxation, to that extent the stock of that bank or trust company is not taxable."

It is true that the *Daly Bank Case* had to do with a state bank and not with a national bank, but under the limitation placed by Congress upon the right of a state to tax national banks as contained in section 5219 of the federal statutes, any constitutional limitation affecting the right of the state to tax state banks must certainly be applicable to national banks. This court did not say in the *Daly Bank Case*, "To the extent that the real estate had been valued by the assessor, the stock of that bank is not taxable," but it said, "To the extent that the capital stock is represented by real estate which is liable to taxation in the state of Montana, to that extent the stock of the bank is not liable to taxation."

MR. JUSTICE COOPER delivered the opinion of the court.

In 1915 the legislative assembly enacted Chapter 31 (Laws 1915, p. 45), amendatory of sections 2503-2505 of the Revised Codes, relating to the assessment of real estate owned by banks, national and state, and shares of stock of such institutions. Section 1 of the Act provides: "All shares of stock in state and



national banks and banking corporations, whether of issue or note [not?], existing by authority of the United States or of this state, and located within this state, and doing business within the state shall be assessed to the owners thereof; \* \* \* all such shares must be listed and assessed with regard to their value at 12 o'clock noon, on the first Monday of March of each year, to be ascertained by adding the surplus and undivided profits to the face value of such shares, provided, that if any portion of the capital stock of any bank or banking corporation herein named, shall be invested in real estate and such bank or banking corporation shall hold title thereto, the assessed valuation of such real estate shall be deducted from the total value of the shares of stock of such bank or banking corporation \* \* \* and such real estate shall be assessed to the bank or banking corporation holding the same, as other real estate. The persons or corporations who appear upon the records of the bank or banking corporation herein named, to be the owners of shares at the close of the business day next preceding the first Monday in March in each year, shall be taken and deemed to be the owners thereof for the purpose of this section. Such shares of stock shall not be assessed at any higher rate than other property and shall be subject to all deductions allowed or given in the assessment of other property."

Section 2 provides that the bank shall pay the assessment upon the shares above mentioned, and that for convenience their assessment shall be entered on the personal property list in the name of the bank.

Section 3 prescribes the duties of bank officers, requiring them to furnish to the assessor certain information with relation to the capital stock, surplus, *etc.*, of the bank.

Pursuing the provisions of the Act, the assessor of Cascade county assessed the shares of the capital stock of the First National Bank of Great Falls more particularly described below. The bank refused to abide by the assessment and a suit was instituted by the treasurer of the county against the bank to have determined the rights of the parties. The matter was submitted

to the court on an agreed statement of facts, the more salient features of which may be briefly epitomized thus:

It is agreed that the cashier of defendant bank delivered to the assessor the statement required by section 2 of the Act, including the face value of the bank's capital stock (\$200,000), the amount of surplus (\$150,000), and undivided profits (\$35,161.90), making a total of all three items of \$385,161.90; that \$344,358.98 of this amount was represented by and invested in real estate owned by the bank and situate in Montana, upon all of which the taxes have been duly paid by the bank; that the real estate owned by it in Cascade county was for the year 1917 assessed by the assessor and valued for assessment at the sum of \$229,730; that the assessor, acting under the provisions of section 1 of the statute above, deducted from the total of capital stock, surplus, and undivided profits amounting to \$385,161.90 the sum of \$229,730, the assessed valuation placed by him upon the bank's real estate located in Cascade county, and thus ascertained that there remained the sum of \$155,431.90, not represented by real estate and taxable to the stockholders of the bank as provided by the statute, and assessed such amount at seventy-five cents upon the dollar, making a total of \$116,575; that agreeably to a ruling of the state board of equalization that all bank stock should be assessed at sixty-five cents upon the dollar the sum last above mentioned was reduced to \$101,030, at which amount the shares were assessed, the tax levied amounting to \$3,705. It was further agreed that if the contention of the bank should be sustained, i. e., that the assessor should have deducted from the total of capital stock, surplus and undivided profits, \$385,161.90, the amount invested in real estate owned by it, to-wit, \$344,358.98, there would have remained \$40,902.92 assessable to the stockholders, which, assessed at sixty-five cents upon the dollar (agreed to be the true valuation for present purposes), would have been of the assessable value of \$26,586.89 only, and that the legal tax on that amount for the year in question would have been but \$975 instead of

\$3,705.26, which sum of \$975 was tendered and paid into court by the bank.

The district court found in favor of the defendant's contention and entered judgment accordingly. The county treasurer has appealed.

The trial court in its preface to the "conclusions of law" stated the point at issue in these words: "The only question presented by the facts in this case is whether the *actual* amount of real estate investments or the *assessed* value of the real estate of the defendant should be deducted from the aggregate of the capital, surplus and undivided profits in ascertaining the value of the shares of the capital stock of the defendant for taxation, section 1 of Chapter 31 above providing that 'the *assessed* valuation of such real estate shall be deducted from the total value of the shares of stock,' *etc.*" The court concluded: "That the assessment of the stock of the defendant \* \* \* is illegal and void, \* \* \* and that \$975 was the total amount of legal assessment that could be levied and assessed against the stockholders of the bank." This in effect means that, inasmuch as the assessor's action in assessing the property in question as he did was in substantial compliance with the provisions of Chapter 31, the statute itself is as illegal and void as the assessment, and that if we uphold the judgment, the Act must of necessity be declared unconstitutional.

Section 1 of Article XII of the state Constitution reads thus: "The necessary revenue for the support and maintenance of the state shall be provided by the legislative assembly, which shall levy a uniform rate of assessment and taxation, and shall prescribe such regulations as shall secure a *just* valuation for taxation of *all property*, except that specially provided for in this Article."

Section 17 of the same Article is as follows: "The word property as used in this Article is hereby declared to include [1]. moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership, but this shall not be construed so as to authorize the taxa-

tion of the stocks of any company or corporation when the property of such company or corporation represented by such stocks is within the state and has been taxed."

"All taxable property must be assessed at its full cash value," says section 2502 of the Revised Codes, and stocks of banks, national or state, fall within the definition of "property" given in section 17 of Article XII above, and must be assessed at their *full cash*, not *assessed*, value, except to the extent that they are represented by real estate otherwise taxed. In *Daly Bank etc. Co. v. Board of Commrs.*, 33 Mont. 101, 81 Pac. 950, this court said, referring to section 17, *supra*: "As that section of the Constitution is in the nature of a prohibition, it is so far self-executing as to prohibit the assessment upon the stocks of a bank or trust company of any greater valuation than the full cash value of such stocks, less the amount of the property representing that stock, which is assessed to the bank or trust company."

With the doctrine there enunciated, we are in full accord; and we affirm that the principles there laid down apply with equal force to national banks doing business within this state. The framers of our Constitution in the matter of providing the necessary revenues for the support of the state, directed the legislatures to come thereafter to levy a *uniform rate* of assessment and taxation under such regulations as would secure a *just* valuation for taxation of *all property*. (Sec. 1, Art. XII.) And then, with prophetic vision, and in the exercise of a wise precaution against inequality of taxation, in language of plainest import, they defined the word "property" to include moneys, credits, bonds, stocks, franchises and all matters and things (real, personal and mixed) capable of private ownership. This important work they did not leave to other hands. And then, to make "assurance double sure" that property once fairly and legally assessed should be immune from again being taxed, they used these plain and unmistakable words: "This shall not be construed so as to authorize the taxation of the stocks of any company or corporation when the property of such company or corporation represented by such stocks

is within the state and has been taxed." Mark the words, "and has been taxed"!

On the record before us, then, the ultimate question to be resolved is whether the method prescribed by the legislature for ascertaining the value of the shares of stock for taxation purposes is not in conflict with the provisions of section 17 of Article XII above which prescribe a different method; and whether such requirement does not also do violence to the provisions of section 5219 of the federal statutes (U. S. Rev. Stats. [U. S. Comp. Stats., sec. 9784]), by which a state is limited and circumscribed in the taxation of national banks to the extent that it shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state." (*First Nat. Bank of San Francisco v. San Francisco*, 129 Cal. 96, 61 Pac. 778.)

In our opinion, the language of Article XII above is unmistakable. The method therein specified for ascertaining the value of the shares of stock is by deducting from the cash value of the shares the amount invested in real estate within the state which has been taxed. (*First Nat. Bank of Albia v. City Council*, 86 Iowa, 28, 52 N. W. 334.) This mode the court below recognized and applied.

It is settled law that a state can impose such a tax only [2] upon a national bank as is authorized by the federal law. Such banks derive their authority to do business in the state from the federal government, and by virtue of federal laws, which are supreme. A state can tax the real estate of a national bank the same as other real estate is taxed, because authority to do so is expressly given by the Act of Congress above referred to. Beyond that it cannot go. That is the measure of its authority. "By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders and to an assessment of the real estate of the bank. Any state tax therefore which is in excess of and not in conformity to these requirements is void." (*Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed.

850, 19 Sup. Ct. Rep. 537. See, also, *Third Nat. Bank v. Stone*, 174 U. S. 432, 43 L. Ed. 1035, 19 Sup. Ct. Rep. 759; *Rosenblatt v. Johnson*, 104 U. S. 462, 26 L. Ed. 832; *First Nat. Bank v. San Francisco*, 129 Cal. 96, 61 Pac. 778.)

The statute in question, then, in so far as it conflicts with [3] the views herein expressed, must be declared a nullity, because its requirements are repugnant to both the letter and the spirit of the constitutional declarations above referred to. From this there is no escape. The result obtained by the assessor in following its specific requirements is itself conclusive against the legality of the assessment and the life of the statute. The provisions of the Constitution are mandatory, and in this instance required that the total amount invested in real estate within the state be deducted from the total of the capital stock, surplus and undivided profits. But notwithstanding this fact, the assessor, acting pursuant to the statute, increased the assessed value of the shares of stock from \$40,902.92 to \$155,431.90. To our minds, the infirmity of a statute could not be more clearly demonstrated nor could its intent be more palpably at variance with the spirit of the Constitution. Thus the statute is made to work out its own destruction and it cannot stand against constitutional safeguards such as these. The people have a right to the Constitution of their adoption and to have all its provisions enforced; and it is the duty of the courts, imperative and unshunnable, to give to its mandates vitality and force.

The judgment is therefore affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

INTERIOR SECURITIES CO., APPELLANT, v. CAMPBELL,  
RECEIVER, ET AL., RESPONDENTS.

(Nos. 4,233 and 4,239.)

(Submitted September 10, 1918. Decided February 3, 1919.)

[178 Pac. 582.]

*Specific Performance — Mortgages — Foreclosure Sales — Receivers — Warranting Title — Caveat Emptor — Burden of Proof — Judgments by Consent.*

**Specific Performance—Receivers—Mortgage Foreclosure Sale—Actions.**

1. *Quære*: May an independent action be maintained against a receiver appointed in a mortgage foreclosure suit, to compel him to specifically perform a contract of sale entered into by him as such?

**Receivers—Mortgage Foreclosure—Sales of Land—Caveat Emptor.**

2. A receiver appointed in a mortgage foreclosure suit was an officer of the court, with authority limited by the terms of the decree, and anyone contracting with him did so at his peril.

**Judgments—Consent Decree—Effect.**

3. A decree by consent has all the force and effect of a judgment *in invitum*, and is nonappealable.

**Receivers—Mortgage Foreclosure Sale—Judicial Sale—Confirmation.**

4. A sale made by a receiver pursuant to a consent decree in a mortgage foreclosure suit instituted under section 6861, Revised Codes, is a judicial sale which does not require confirmation by the court in order to pass title to the purchaser.

**Judicial Sale—Warranting Title—Receivers—Excess of Power—Specific Performance.**

5. A receiver appointed under a decree in a foreclosure suit directing him to sell the property covered by the mortgage, was without authority to convey by warranty deed or contract to perfect the title if defective; a contract in this behalf, therefore, was not a proper subject for specific performance.

**Same—Nature of Transaction.**

6. In every judicial sale the court itself is the vendor, and the officer executing the power, whether receiver, trustee or master in chancery, is a ministerial agent.

**Same—Caveat Emptor.**

7. In judicial sales, the rule of *caveat emptor* applies in its utmost vigor.

[As to *caveat emptor* as applied to judicial sales, see note in 26 Am. Rep. 38.]

**Specific Performance—Foreclosure Sale—Duty of Court.**

8. In an action for specific performance of a contract of sale made by a receiver appointed in a mortgage foreclosure, the court must look to the real parties in interest and refuse relief if the contract was not just and reasonable, or if performance would operate more harshly upon the parties than its refusal would upon the plaintiff seeking performance.

**Receivers—Sales—Approval by Court.**

9. A court of equity has inherent power to withhold approval of a contract of sale of land, if the receiver in entering into it acted imprudently or inadvertently to the prejudice of the mortgagee.

**Specific Performance—Burden of Proof.**

10. One who seeks specific performance of a contract of sale made by a receiver in a foreclosure suit, has the burden of showing that the contract was just and fair in all respects.

**Same—Equity—Duty of Plaintiff.**

11. One seeking specific performance must come into court with clean hands and with a cause the ethical qualities of which are such as to commend it to the conscience of the chancellor.

**Same—Discretion.**

12. Specific performance is not granted as a matter of abstract right, but the application therefor is addressed to the sound, legal discretion of the court, the exercise of which will not be interfered with on appeal in the absence of a clear showing of abuse thereof.

*Appeal from District Court of Rosebud County, in the Fifteenth Judicial District; H. Leonard De Kalb, a Judge of the Tenth District, presiding.*

ACTION by the Interior Securities Company, a corporation, against Donald Campbell, as receiver, and others, for specific performance.

The Cartersville Irrigated Land Company filed cross-complaint. Judgment dismissing both complaints. Consolidated appeals from judgment and from order overruling motion for new trial. Affirmed.

*Messrs. Loud & Leavitt, Mr. W. G. Armstrong and Messrs. Christopherson & Jackson, for Appellant, submitted a brief; Mr. Chas. H. Loud argued the cause orally.*

The judgment herein specifies that it was entered by consent in open court, and we are going to assume that it is conceded by all parties that this decree was entered by consent, and that the rights of everyone arise from and by virtue of this decree so entered. "No one can complain of a judgment entered by his consent." (*Corby v. Abbott*, 28 Mont. 523, 73 Pac. 120; *Stites v. McGee*, 37 Or. 574, 61 Pac. 1129; 14 Standard Ency. Pro. 913.) This being a valid decree and being absolutely conclusive upon the consenting parties, amounts to a contract between the Cartersville Irrigated Land Company and the



defendant Northwestern Trust Company providing for the appointment of a trustee for the sale of the property involved and providing the mode, manner and conditions for the sale thereof as well as for the method for the adjustment of the credits which the Cartersville Irrigated Land Company is entitled to on account of the sales of lands to be made by the receiver or trustee thereunder. While Mr. Campbell is designated by the decree as a receiver, he is in reality a mere trustee, agent or instrument for the sale of these lands, and by reason of this fact there was no necessity for the confirmation of any of the sales made by him.

It is our further contention that, independent of the question as to whether Mr. Campbell is to be regarded as a receiver or as an agent or trustee for the sale of the property, the decree makes any sale made by the person authorized to make it in accordance with its terms a judicial sale, so that no confirmation of the court is necessary; that is to say, that where there has been a judgment or decree of court and an execution or its equivalent issued thereon, the officer conducting the sale is merely the agent of the court, and such a sale is a judicial sale and no order confirming it is necessary. The question involved is not one of frequent occurrence, apparently. But what few authorities we have been able to find are in support of our contention.

The rule as laid down by High on Receivers, third edition, section 1989c, seems to exactly fit the conditions of the case at bar. "If in making a sale of property the receiver conforms in all respects to the order of the court no confirmation is necessary to give it full validity and effect."

To the same effect see *In re Application of Denison* (*White v. Rand*), 114 N. Y. 621, 21 N. E. 97; *Williamson v. Berry*, 8 How. (U. S.) 495, 496, 546, 12 L. Ed. 1170, 1192; *In re Van Allen*, 37 Barb. (N. Y.) 225; *Attorney General v. Guardian Mut. Life Ins. Co.*, 77 N. Y. 272, 277; *Attorney General v. North American Life Ins. Co.*, 89 N. Y. 94, 103; *Files v. Brown*, 124 Fed. 133, 59 C. C. A. 403.

An agent authorized to sell real property has authority to agree that the conveyance shall be by warranty deed. (*Schultz v. Griffin*, 121 N. Y. 294, 18 Am. St. Rep. 825, 24 N. E. 480.) In *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844, 5 L. R. A. 654, 22 N. E. 233, it is said: "The right to an indisputable title clear of defects and encumbrances does not depend upon the agreement of the parties, but is given by the law." If the vendee is entitled to a merchantable title, there is not any good reason for denying the right to stipulate for the conveyance of such title by the form of conveyance assuring the same.

*Messrs. Gunn, Rasch & Hall* and *Messrs. Collins, Campbell & Wood*, for Respondents, submitted a brief; *Mr. M. S. Gunn* argued the cause orally.

A receiver is an officer of the court. He has no power or authority to dispose of, or contract with reference to, the property over which he is appointed receiver, except such as may be granted to him by the court. Anyone contracting with a receiver is charged with notice of his authority. If a receiver makes a contract in excess of his authority, such contract will not be approved by the court and is not enforceable.

The receiver exceeded his power in agreeing to make a warranty deed and to perfect the title if there should be any defects. The authority of the receiver was limited to a sale of whatever title he had, and he could not bind the estate by a covenant of warranty or by an agreement to perfect title. (High on Receivers, 4th ed., p. 233; 1 Clark on the Law of Receivers, 683.)

The authority of the receiver to sell the lands is limited and controlled by the judgment. The contract does not require the mortgage to be made by the purchaser to comply with the requirements of the judgment in the particulars we have already pointed out. The purchaser is charged with notice of the authority of the receiver, and as the receiver exceeded his authority, the contract made cannot bind the estate in his

possession as receiver. (High on Receivers, 4th ed., 215, sec. 186; *Ellis v. Little*, 27 Kan. 707, 41 Am. Rep. 434; *Hendrie etc. Mfg. Co. v. Parry*, 37 Colo. 359, 86 Pac. 113.)

The contract was made subject to the approval of the court, and the court may, and should, if it appears that the contract is not fair, equitable and just, disapprove of the same. (*In re Trust etc. Bank of Billings*, 45 Mont. 89, Ann. Cas. 1913C, 1327, 122 Pac. 561; *Attorney General v. Continental Life Ins. Co.*, 94 N. Y. 199.)

Mr. Campbell is not a receiver but is, in fact, a trustee authorized to sell the lands upon the terms and conditions specified in the judgment. It is further argued that the approval of the contract by the court was not necessary to its validity and enforceability. Whether Mr. Campbell is regarded as a receiver or a trustee is wholly immaterial. A trustee authorized to sell property is limited in his power by the terms of the instrument creating the trust, just the same as a receiver, authorized to sell, is limited by the judgment or order of the court granting him authority to sell. If a trustee is authorized to exercise discretion and is guilty of an abuse of such discretion, his acts and conduct are subject to review by the court, the same as the acts and conduct of a receiver. (*Wormley v. Wormley*, 8 Wheat. 421, 5 L. Ed. 651; *Hunt v. Townshend*, 31 Md. 336, 100 Am. Dec. 63; *Read v. Patterson*, 44 N. J. Eq. 211, 3 Am. St. Rep. 305, 14 Atl. 490; *Bertron v. Polk*, 101 Md. 686, 61 Atl. 616.) The principles of law announced in the foregoing cases have been embodied into the statutory law of this state. (See secs. 5399 and 5401, Revised Codes.)

Not only has a court of equity inherent jurisdiction to supervise the execution of trusts, but where it is sought to enforce specific performance of a contract made with a trustee, the court will, irrespective of its power to exercise supervisory control over trustees and trust estates, refuse specific performance where the contract is not fair, equitable or just. Specific performance is not granted, as a matter of course, but

is granted in the exercise of a sound legal discretion. (*Sherman v. Wright*, 49 N. Y. 227; *Tamm v. Lavalle*, 92 Ill. 263; *Willard v. Taylor*, 8 Wall. 557, 19 L. Ed. 501; *Banaghan v. Malaney*, 200 Mass. 46, 128 Am. St. Rep. 378, 19 L. R. A. (n. s.) 871, 85 N. E. 839; *Shoop v. Burnside*, 78 Kan. 871, 98 Pac. 202; *McCabe v. Matthews*, 155 U. S. 550, 39 L. Ed. 253, 15 Sup. Ct. Rep. 190; *Ratterman v. Campbell*, 26 Ky. Law Rep. 173, 80 S. W. 1155.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In a suit to foreclose a mortgage pending in the district court of Rosebud county, wherein the Northwestern Trust Company, mortgagee, was plaintiff, and the Carterville Irrigated Land Company, mortgagor, and the First National Bank of Forsyth were defendants, Donald Campbell was appointed receiver of the property in controversy. Thereafter on August 3, 1916, a decree by consent was rendered and entered, which, among other things, provided that the receivership should be continued; that the land company should convey the mortgaged property to the receiver; that the receiver should sell the property or so much thereof as should be necessary to realize a sum sufficient to pay all costs and expenses and satisfy the mortgage indebtedness; and that the residue, if any, should be reconveyed to the land company. The decree fixed the minimum price for which each legal subdivision could be sold, and authorized the receiver to accept cash for one-third of the sale price and promissory notes payable to the trust company and secured by mortgage on the property sold, for the remaining two-thirds. For the purposes of his trust the receiver was authorized to treat such notes as cash and credit the receipts from the sales upon the indebtedness after deducting the expense. The decree prescribes the manner of conducting the sales and enumerates certain terms which should be contained in any mortgage securing deferred payments.

On September 3, 1917, the receiver entered into a contract with the Interior Securities Company, by the terms of which he agreed to sell to that company all the land then held by him (excepting 1,146 acres) for the sum of \$180,000 (in round numbers), one-third payable in cash and the remainder to be represented by the securities company's note payable to the trust company and secured by a mortgage upon the property sold. Thereafter the receiver declined to carry the agreement into effect, unless and until the same was approved by the court, and this action was instituted to enforce specific performance, and, as ancillary relief, to secure an injunction *pendente lite* restraining the receiver from selling these lands to any other person. The trust company and land company were joined with the receiver as defendants, and all answered. The land company made common cause with the plaintiff, while the receiver and the trust company interposed substantially the same defenses. After a hearing, the injunction was denied, and a trial upon the merits resulted in a judgment dismissing the complaint of the plaintiff and the cross-complaint of the land company. Plaintiff and the land company each appealed from the judgment and from the order overruling its motion for a new trial. These appeals have been consolidated. Upon application of the appellants this court issued an injunction pending the determination of the appeals.

This cause was tried to the lower court upon the theory that [1] an independent action may be maintained to compel a receiver to specifically perform a contract entered into by him, and we shall determine the appeals upon the same theory without, however, expressing any opinion as to its correctness.

1. In view of the allegations contained in plaintiff's complaint, it would seem that it is estopped to say that Mr. Campbell was not receiver; but whether he was technically a receiver, a trustee, or a master in chancery, is of little consequence in [2] our view of the case. For convenience only he will be designated "receiver." He was not merely the agent of the parties to the foreclosure suit, but was an officer of the court.

When he took possession of the property, it thereby passed into the custody of the law. His authority was limited by the terms of the decree, and plaintiff, contracting with him, did so at its peril.

The fact that the decree was entered by consent did not [3] change the status of this officer from what it would have been had the decree been entered after contest, for a decree by consent has all the force and effect of a judgment *in invitum* (*Harding v. Harding*, 198 U. S. 317, 49 L. Ed. 1066, 25 Sup. Ct. Rep. 679; 15 R. C. L. 645; 23 Cyc. 729), with the additional characteristic that it is nonappealable (*Corby v. Abbott*, 28 Mont. 523, 73 Pac. 120).

2. If this contract had been fully executed, the resulting [4] transaction would have constituted a judicial sale. A sale made pursuant to a decree of court in an action to foreclose a mortgage instituted under section 6861, Revised Codes, is a "judicial sale." (*Black v. Caldwell* (C. C.), 83 Fed. 880.) We agree with appellants that under our statute such sale, if made, would not have required confirmation by the court in order to pass title to the purchaser. Mr. Campbell was the officer designated by the court to carry its decree into effect, and the decree itself was the authority by virtue of which the property was to be sold. (*Thomas v. Thomas*, 44 Mont. 102, Ann. Cas. 1913B, 616, 119 Pac. 283.)

But granting that the court's approval of the contract was not necessary to authorize the sale and that confirmation of the sale, if made, would not have been necessary to pass title, still it does not follow that appellants are entitled to a decree awarding specific performance. They cannot insist that this [5] contract should be enforced if as a matter of fact the receiver exceeded his authority in entering into it, and that he did exceed his authority is manifest.

The decree directs the receiver to sell the property and by necessary implication authorizes him to make proper conveyance. By the terms of the contract he agreed to convey the property by warranty deed, and, to the end that he might be

able to do so, he agreed further to perfect the title to any lot, piece or parcel of land the title to which was defective. We need only refer to the character of a judicial sale to determine that the receiver was without authority to convey by warranty deed or to contract to do so. "A judicial sale is one which is made by a court of competent jurisdiction, in a pending suit, [6] through its authorized agent." (4 Words and Phrases, 3867.) In every such sale the court itself is the vendor (*Hess v. Deppen*, 125 Ky. 424, 15 Ann. Cas. 670, 101 S. W. 362), and the officer executing the power, by whatever name designated, [7] is a ministerial agent (16 R. C. L. 6). The rule of *caveat emptor* applies in its utmost vigor. The court undertakes to sell, and can only sell, the right, title and interest of the parties to the action, and the purchaser is charged with knowledge of this fact. He steps into the shoes of the parties, stands in their places, acquires their interest as it existed in their hands, subject to all the infirmities of title then attaching to the estate, and to all equities which operated as a limitation upon the apparent estate which they had. (16 R. C. L. 119-138.) In view of this rule, it is apparent from the terms of the decree that the receiver was not authorized to warrant the title to the property sold, or to waste the funds of the estate in his hands in an effort to perfect the title.

There are other respects in which we think the receiver exceeded his authority, but these need not be considered further.

Whether, upon the showing made, the court would have been justified in reforming the contract and decreeing its performance, is a question not presented to the trial court nor here. The court below was not requested to reform the contract, but to enforce it as written.

3. This case is somewhat anomalous, in that the contract is attacked on the ground that the receiver agreed to sell these lands at a price greatly in excess of the minimum fixed by the decree and greatly in excess of their fair market value. At the time the contract was entered into, there was due from the land company to the trust company \$140,000, and this indebted-

ness was secured by the mortgage upon all the real estate in the hands of the receiver—5,326 acres—and by a pledge of \$40,000 worth of personal property belonging to P. J. Lyons. The 1,146 acres of land held by the receiver but not included in the contract are of the value of approximately \$100,000. In view of the fact that the compensation of the receiver had not been fixed by the court and that the exact amount of other expenses could not be determined in advance, we must assume for present purposes that the receiver did not undertake to sell more land than necessary to raise a sum sufficient to pay the costs and expenses and discharge the mortgage indebtedness. If this contemplated sale, then, had materialized, the receiver, acting pursuant to the provisions of the decree, would have credited the original mortgage indebtedness with the amount of the securities company's note (\$120,000) and \$20,000 of the cash payment, thereby satisfying and discharging that indebtedness in full. The remainder of the \$60,000 would have been applied in satisfaction of the costs and expenses of the receivership and trusteeship, and the costs and expenses of the foreclosure suit. The 1,146 acres would have been reconveyed to the land company, and the Lyons pledge would have been released. The trust company would have received the \$20,000 in cash and the securities company's note for \$120,000, secured by the mortgage on the 4,180 acres described in the contract.

In his answer the receiver sets forth that he entered into this contract inadvertently and without due appreciation of the results to flow from its execution. He alleges that the land described in the contract is worth not to exceed two-thirds of the sale price mentioned, and offers to execute the contract provided the sale price is reduced one-third, or provided other lands in his possession, sufficient to raise the valuation to the contract price, are included. The trust company makes the same charge of overvaluation, alleges that the receiver exceeded his authority in many particulars, which are enumerated, and alleges further that the securities company was organized



for the express purpose of procuring this contract; that it is not financially responsible; and that the securities company, the land company, and Lyons entered into a conspiracy to cheat and defraud the trust company and secured this contract as the means through which to carry their conspiracy into effect; that it was the intention of the securities company to default in payment of the principal and interest on the note for \$120,000 and in the payment of taxes against the land; and that the land itself is not of sufficient value to secure the payment of the note. The trust company contends in effect that, if this sale is consummated, it will be called upon to surrender its original claim for \$140,000 secured by property worth \$260,000, and to accept in lieu thereof \$20,000 in cash and a note for \$120,000 secured by mortgage upon lands worth less than the face of the note, without recourse except to foreclose, obtain a worthless deficiency judgment and suffer substantial loss, whereas by the expenditure of the \$60,000 the land company and Lyons will have turned back to them property of the value of \$140,000 free from encumbrance. From the record before it, the trial court might fairly infer that this contention is well founded and that the contract is not reasonable, equitable and fair.

There are some facts and circumstances disclosed by this record which reflect upon appellants' good faith, but it is not necessary that the alleged conspiracy be proved in order that [8] the trial court's conclusions be justified. The court was not merely permitted, but was required, to look beyond the receiver (the nominal party to the contract), to the trust company and land company (the real parties in interest), and refuse specific performance of the contract if its terms, as to either of them, are not just and reasonable (sec. 6103, Rev. Codes), or if the performance would operate more harshly upon either of them than its refusal would upon the plaintiff who seeks performance (sec. 6105, Rev. Codes), and it is immaterial that appellants may have acted in good faith. The [9] authority of a court of equity over its own process to

prevent abuse by its officer is inherent and as extensive and efficient as the exigencies of the case require; and, if the receiver in entering into this contract acted improvidently or inadvertently to the prejudice of the trust company, the court was justified in withholding its approval (*In re First Trust & Savings Bank*, 45 Mont. 89, Ann. Cas. 1913C, 1327, 122 Pac. 561).

We think the evidence is sufficient to justify the court's [10] conclusion. Appellants were required to sustain the burden of proof and to show that the contract was just and fair in all respects. There is a conflict in the evidence as to whether the property described in the contract is sufficient security for the debt. This conflict was resolved by the court in favor of the trust company and the receiver, and with this finding we do not feel inclined to interfere. The appellants have not acquired any fixed right to have this sale completed, and under the circumstances it appears more equitable that they should lose their bargain, than that the trust company should be made to suffer loss through compelling the receiver to execute the contract. Finally, appellants must assume the burden of showing that by its decision the trial court committed error to their prejudice.

A decree for specific performance is not granted as a matter [11, 12] of abstract right, but in every instance the application for such relief is addressed to the sound, legal discretion of the court. (*Wolf v. Great Falls W. P. & T. Co.*, 15 Mont. 49, 38 Pac. 115.) To secure the desired relief in this instance, appellants were required to come into court with clean hands and with a cause whose ethical qualities were such as to commend it to the conscience of the chancellor. The case comes within the general rule, often adverted to by this court, that in the absence of a clear showing of abuse of discretion the decision of the lower court will be affirmed.

The judgment and order in each instance are affirmed, and the injunction heretofore granted by this court is dissolved.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY concurs.

STATE EX REL. BOULWARE, RELATOR, v. PORTER, STATE  
AUDITOR, RESPONDENT.

(No. 4,357.)

(Submitted January 30, 1919. Decided February 6, 1919.)

[178 Pac. 832.]

*State Legislature—Election Contest—Jurisdiction—Compensation—Mandamus—Office and Officers—Burden of Proof.***Office and Officers—Compensation—Burden of Proof.**

1. Emoluments follow the legal title to an office; hence one who seeks to enforce payment of compensation attached to an office has the burden of showing that he is in right as well as in fact the officer he claims to be.

**State Legislature—Election Contest—Compensation—Mandamus.**

2. After relator had taken the oath of office as a member of the house of representatives, and had participated in the organization of the house and subsequent proceedings therein, a contest of his election was instituted. Hearing of the contest was deferred until a proper presentation of contestants' evidence, and a resolution adopted by the house declaring relator entitled to a seat until determination of the contest, and calling upon the sergeant-at-arms to certify relator's name to the state auditor upon the payrolls of the house. The auditor declined to issue a warrant in payment of relator's compensation. *Held*, on *mandamus*, that the resolution was sufficient evidence of a determination by the house that the relator was a *de jure* member until such time as it might determine otherwise, and was therefore entitled to compensation as such. (MR. CHIEF JUSTICE BRANTLY dissenting.)

**Same—Right to Seat—How and by Whom Determinable.**

3. Each house of the legislative assembly is by the Constitution clothed with plenary and exclusive authority to determine for itself, and in its own way, whether a person who presents himself for membership is entitled to a seat, and each member, after seated, holds his office at the will and pleasure of the house to which he belongs, its authority in this respect being a continuing one running throughout the term for which he is elected.

[As to jurisdiction of courts to review proceedings of bodies having power to judge of election and qualifications of members, see note in 16 Am. St. Rep. 220.]

**Mandamus.** Original application by the State on the relation of Charles Boulware to compel George P. Porter, State Auditor, to issue a warrant to relator as compensation for services performed by him as a member of the house of representatives. Peremptory writ directed to issue.

*Mr. D. M. Kelly* and *Mr. William F. Meyer*, for Relator; *Mr. Kelly* argued the cause orally.

*Mr. S. C. Ford*, Attorney General, and *Mr. Frank Woody*, Assistant Attorney General, for Respondent; *Mr. Woody* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This proceeding was submitted upon pleadings which raise no material issues of fact and presents for determination the question: Is the relator entitled, as a matter of right, to compensation for services rendered as a member of the house of representatives in the sixteenth legislative assembly?

From the record we learn these facts: The county canvassing [1, 2] board declared the relator elected and issued to him a certificate of election. On the opening day of the session he presented his certificate, took the constitutional oath, assumed the duties of his office, participated in the organization of the house and thereafter in its subsequent proceedings. A contest of his election and the election of eight of his associates was instituted and a statement in writing setting forth the grounds of contest was presented to the house, referred to the appropriate standing committee which, after preliminary investigation, declined to proceed with a hearing until the contestants present their evidence in the form prescribed by sections 82-90, Revised Codes. Thereafter, on January 22, the house adopted a resolution, which recited the facts relating to the contest and the action of the committee, and the further fact that a determination of the contest will involve delay, and concluded as follows: "Be it resolved: That said contestees be and they are hereby, declared to be members of this house and entitled to seats therein until the final determination of said contest; and. Be it further resolved, that the sergeant-at-arms be instructed to certify said members to the state auditor upon the pay-rolls of this house, and that the state auditor be advised that they are and shall be the qualified and acting members of this house until the final determination of said contest."

We are not called upon to determine the abstract question: Is a *de facto* member of the legislative assembly entitled to com-

pensation pending a final determination of a contest which challenges his right to the seat? For present purposes we may assume that the *dictum* pronounced by this court in *State ex rel. Thompson v. Kenney*, 9 Mont. 223, 23 Pac. 733, expresses correctly the rule of procedure to be observed in a case like the supposititious one involved in the question just propounded.

Conceding for present purposes that relator is entitled to the privileges and immunities of a member and that he may vote upon pending measures, it is nevertheless the contention that when he comes into court to enforce the payment of compensation on account of his services, he must assume the burden of showing that he is in right as well as in fact a member of the house. We agree with this contention, for it is the general rule that the emoluments follow the legal title to the office. (*Rasmussen v. Board*, 8 Wyo. 277, 45 L. R. A. 295, 56 Pac. 1098.) What evidence is necessary to exhibit to this court the fact that relator is a *de jure* officer?

The Constitution clothes each house of the legislative assembly with plenary and exclusive authority to determine upon the election, returns and qualifications of its members. (Art. V, sec. 9.) The authority thus recognized as lodged in each house, is indispensable to its independence and existence. It emanates directly from the people to each house as an independent entity and cannot be delegated or granted away. Each house acts for itself and from its decision there is no appeal. No individual, officer, court or other tribunal can infringe upon its exclusive prerogative to determine for itself, and in its own way, whether a person who presents himself for membership is entitled to a seat. (*State ex rel. Smith v. District Court*, 50 Mont. 134, 145 Pac. 721; *State ex rel. Ford v. Cutts*, 53 Mont. 300, 163 Pac. 470.) Either house may even act arbitrarily and in disregard of fundamental rights. It may oust a member whose election is beyond controversy and seat as a member a person who is disqualified for the office, but, if it should do so, there is still no recourse. This case presents no analogy to the one of a *de facto* state or county officer whose right is contested

and whose title to office depends upon a judicial determination of the controversy. Relator holds his seat—as does every other member—at the will and pleasure of the house. If, then, the house has determined the right of relator to the office, its decision is conclusive upon the courts.

It cannot be maintained that it was the intention of the house in adopting the resolution above, to do nothing more than recognize the relator as a *de facto* member. That recognition had been accorded him from the hour the house assembled. If the purpose was not to determine the right of relator to his seat, then the resolution is meaningless. But this court will not indulge the presumption that the house acted without any purpose or in bad faith, but, on the contrary, will view the resolution in the light of surrounding circumstances and give to it the meaning which harmonizes with the apparent purpose intended.

It is suggested, however, that the resolution does not purport to evidence a final determination of relator's right, but in this [3] connection the term *final* is a misnomer. Upon the question of the election and qualification of a member, there cannot be such a thing as a final decision, in the sense of a decision conclusive upon the house, until final adjournment for the term for which the members, in this instance, were elected. The authority to pass upon the membership is a continuing one and runs throughout the term. It is so complete and conclusive that relator may be seated to-day after a hearing, and deprived of his office to-morrow upon the same facts. After a member has received compensation for his services for fifty-nine days of the session, the house may then declare that he was never legally elected and seat another in his stead with the right to compensation from the opening day. Neither the fact that the state may be called upon to pay double compensation, nor the fact that one of the two contenders has received compensation, reflects in the least upon the ultimate right to the office.

Our conclusion is that in the resolution above, the relator has presented to this court evidence of a determination by the

house that he is *de jure* a member until such time as the house may determine otherwise, and that he is entitled to the compensation which attaches to the office.

It is ordered, adjudged and decreed that a peremptory writ of mandate issue herein directed to the respondent, as auditor of the state of Montana, commanding him to deliver to the relator a warrant upon the state treasurer for the compensation to which relator is entitled by virtue of his membership in the house of representatives of the sixteenth legislative assembly.

MR. JUSTICE COOPER concurs.

MR. CHIEF JUSTICE BRANTLY: I dissent. The writ of *mandamus* lies only to compel the performance of a clear legal duty. (Sec. 7214, Rev. Codes; *State ex rel. Breen v. Toole*, 32 Mont. 4, 79 Pac. 403; *State ex rel. Donlan v. Board of County Commrs.*, 49 Mont. 517, 143 Pac. 984; *State ex rel. Culbertson Ferry Co. v. District Court*, 49 Mont. 595, 144 Pac. 159.) The affidavit of the relator discloses that his title to the office is put in issue by a contest. Until the issue is determined finally, the relator does not, in my opinion, exhibit a clear right to the compensation which attaches to the office. It is true, the house in which he now occupies a seat is the exclusive judge of the election of its own members; but it has not yet undertaken to determine whether the relator is in fact a member either for the term or for any portion of it. The resolution goes no further than to declare what the statute itself declares, *viz.*: that the certificate held by him is *prima facie* evidence of his right to membership of the house. (Rev. Codes, sec. 56.) It does not have the effect of giving him a right to demand that the auditor issue to him a warrant for his compensation, nor enjoin upon the auditor the duty to do so, so long as his title to the office is contested.

The supposed case stated by Mr. Justice Harwood, in *State ex rel. Thompson v. Kenney*, 9 Mont. 223, 23 Pac. 733, cited by Mr. Justice Holloway, is exactly the case presented by relator's

affidavit, and though the conclusion announced by Mr. Justice Harwood was a *dictum* not called for by the facts of the case before the court, I think it embodies the rule which should be observed in this case. If relator should finally be seated, he would be entitled to compensation from the beginning of the term. If the contestant should finally be seated, he would be entitled to compensation for the same time. It, therefore, being uncertain whether the relator will ever be entitled to any compensation, it is not clearly the duty of the auditor to issue him a warrant for compensation. ▲

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**CITIZENS' STATE BANK OF ROUNDUP, RESPONDENT, v.  
SNELLING, APPELLANT.**

(No. 3,959.)

(Submitted January 10, 1919. Decided February 10, 1919.)

[178 Pac. 744.]

***Promissory Notes—Defenses — Cancellation — Fraud—Burden  
of Proof.***

**Promissory Notes—Defenses—Fraud—Cancellation—Burden of Proof.**

1. In an action on a promissory note, the cancellation of which was sought by defendant for fraud in its execution, upon proof by plaintiff bank that it had purchased the note before maturity and for value, the burden was upon defendant to show that fraud had entered into the stock subscription in part payment of which the note had been given, and that plaintiff bank had knowledge thereof when it bought the paper.

**Same—Evidence—Statements Made After Transfer—Irrelevancy.**

2. Statements of officers of a bank suing on a promissory note, made months after its purchase for value and having no bearing upon the dealings between the maker and the payee's agent which culminated in the giving of the note, could not affect its transfer to plaintiff bank.

**Same—What not Actionable Fraud.**

3. Statements in the nature of prophecies made by a promoter of stock, to the effect that profits of the corporation proposed to be formed would be large, that all but the first payment on the subscription price would be taken care of by the profits, that a large number of bankers had subscribed and would become active agents for the company, etc., held insufficient to charge actionable fraud.

[As to stockholders' subscriptions as affected by fraud, see note in 3 Am. St. Rep. 824.]



*Appeal from District Court, Musselshell County; Chas. L. Crum, Judge.*

ACTION by the Citizens' State Bank of Roundup against Ernest E. Snelling. From a judgment for plaintiff and an order denying him a new trial, defendant appeals. Affirmed.

*Mr. Thomas J. Mathews* and *Mr. E. K. Cheadle*, for Appellant, submitted a brief; *Mr. Cheadle* argued the cause orally.

The case should not have been taken from the jury unless it appeared as a matter of law that no verdict could have been rendered for the appellant from any view which could reasonably be drawn from the evidence. (*Cain v. Gold Mt. Min. Co.*, 27 Mont. 529, 71 Pac. 1004; *McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 701; *Stewart v. Stone & Webster Engineering Corp.*, 44 Mont. 160, 119 Pac. 568.) A verdict should not be directed for either party where substantial evidence has been introduced tending to support the contentions of the adverse party. The weight of such evidence should be a question for the jury. (*Ball v. Gussenhoven*, 29 Mont. 321, 74 Pac. 871.) The court may direct a verdict when the evidence is so convincing that any verdict which might be rendered contrary to it would be set aside. (*Bean v. Missoula Lumber Co.*, 40 Mont. 31, 104 Pac. 869.) Where the evidence is conflicting and the case is not made out for either party clearly and indisputably, the court will not direct a verdict. It is the province of the jury to determine the weight of testimony under the instructions of the court. (*Whalen v. Harrison*, 26 Mont. 316, 67 Pac. 934; 38 Cyc. 1567-1569.)

The testimony of appellant shows without contradiction that the promissory note was executed without consideration and that the execution thereof was induced by fraud. Respondant's sole claim to recover under the evidence of this case is that it purchased the said promissory note in due course and before maturity. Want of consideration and fraud having been shown, however, the burden is upon the respondent to

prove its *bona fides* in the requirement of the promissory note. Plaintiff must sustain the burden of proving that he is a *bona fide* purchaser if the presumption that he is such has been impeached by evidence showing fraud. (*Rossiter v. Loeber*, 18 Mont. 372, 45 Pac. 560.) Where a negotiable instrument is obtained by fraud, a subsequent purchaser must show his good faith. (*Harrington v. Butte & Boston Min. Co.*, 22 Mont. 1, 69 Pac. 102.) Where there is fraud in the inception of the note, the burden of proving good faith is upon the purchaser. (*Thamling v. Duffy*, 14 Mont. 567, 43 Am. St. Rep. 658, 37 Pac. 363.)

*Mr. V. D. Dusenbery*, for Respondent, submitted a brief and argued the cause orally.

In order to sustain an action in deceit or to defend an action on a contract because of fraudulent misrepresentations, it is necessary to plead and prove that the misrepresentations resulted in injury or damage. (Rev. Codes, 5072; *Power & Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950; *Butte Hdw. Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *Spencer v. Hersham*, 31 Mont. 120, 77 Pac. 418; *Marriner v. Dennison*, 78 Cal. 202, 20 Pac. 386, at 390; *Spreckels v. Gorrell*, 152 Cal. 383, 92 Pac. 1011; *Woodson v. Winchester*, 16 Cal. App. 472, 117 Pac. 565; *Bailey v. Oatis*, 85 Kan. 339, 116 Pac. 830; *Alden v. Wright*, 47 Minn. 225, 49 N. W. 767; *Carrington v. Omaha Life Assn.*, 59 Neb. 116, 80 N. W. 491; *Wingate v. Render* (Okl.), 160 Pac. 614; 20 Cyc. 42, 102; 9 Cyc. 431.) A misrepresentation in order to constitute actionable fraud, must be of an existing fact, or a fact that has existed in the past, and not a mere promise as to future events. (20 Cyc. 20; *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; *Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202, 17 Pac. 21; *Hubbard v. Long*, 105 Mich. 442, 63 N. W. 644, at 646; *Blacke v. Miller*, 75 Mich. 323, 42 N. W. 837; *Pollard v. McKinney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.) Mere statements of

opinion, although erroneous, do not, as a general rule, constitute fraudulent misrepresentations. (20 Cyc. 51; *Bankson v. Lagerlof* (Iowa), 75 N. W. 661; *Esterly Harvesting Machine Co. v. Berg*, 52 Neb. 147, 71 N. W. 952; *Butte Hdw. Co. v. Knox*, *supra*; *Collins v. Jackson*, 54 Mich. 186, 19 N. W. 947, at 949.)

Where the evidence is in such condition that if the case were submitted to the jury and a verdict rendered, it would be the duty of the court to set it aside, it is proper to direct a verdict. (*Escallier v. Great Northern R. Co.*, 46 Mont. 238, Ann. Cas. 1914B, 468, 127 Pac. 458; *Tudor v. Northern Pac. R. Co.*, 45 Mont. 456, 124 Pac. 276; *Bean v. Missoula Lbr. Co.*, 40 Mont. 31, 104 Pac. 869.) A mere scintilla of evidence is not sufficient to warrant submitting a case to the jury. (*Escallier v. Great Northern R. Co.*, *supra*; 6 Ency. of Pl. & Pr. 687; *Hillyer v. Dickinson*, 154 Mass. 502, 28 N. E. 905; *Pierce v. Great Falls & C. Ry. Co.*, 22 Mont. 445, 56 Pac. 867.) The same rule applies where the evidence on behalf of the plaintiff is sufficient to prove his cause of action, and there is no substantial evidence offered by the defendant, that the court may properly instruct the jury to return a verdict for the plaintiff. (*Ketchum v. Wilcox*, 5 Kan. App. 881, 48 Pac. 446; *Irwin v. Dole*, 7 Kan. App. 84, 52 Pac. 916; *Carmack v. Drum*, 27 Wash. 382, 67 Pac. 808.)

MR. JUSTICE COOPER delivered the opinion of the court.

This is an action on a promissory note for \$1,000 dated December 11, 1914, and due six months after date. The complaint alleges execution and delivery to Baker on December 11, 1914; its transfer to plaintiff on December 12, 1914, for a valuable consideration, and nonpayment. The answer denies its transfer and delivery to plaintiff; and alleges affirmatively that if the plaintiff purchased the note, it did so long after maturity and notice of a valid defense thereto; that some time prior to December 11, 1914, one Baker, at Roundup in Musselshell county, endeavoring to sell stock in the Bankers' Hail

Insurance Company, a corporation about to be organized, solicited defendant to subscribe for stock in said company; and in order to obtain his stock subscription, made to him certain false and fraudulent representations, knowing them to be false, all of which defendant believed to be true, and, so believing, subscribed for \$2,000 of the capital stock of said proposed corporation, and made, executed, delivered and indorsed the note mentioned, in payment of the first installment of the subscription. More particularly, the answer alleges that "said Baker further represented that the Citizens' State Bank of Roundup, Montana, the plaintiff herein, had purchased \$2,500 of the stock of said proposed corporation, and had offered to exchange \$4,000 of the stock of the Montana Life Insurance Company for an equal amount of stock in the proposed corporation." Also that 140 other bankers in the state of Montana had subscribed for stock in said proposed company, and that each of these bankers would become an active agent for the proposed corporation in soliciting hail insurance; that agents' commissions would be twenty per cent of the premium, and that by reason of the position of the banks in the state, and the advantage that would accrue to the proposed company thereby, the profits would be large, and that the only payment that it would be necessary for him to make, would be the first, as all other payments would be taken care of out of the profits of the corporation. It also sets forth that one John Chandler and one C. O. Tupper, acquaintances and friends of defendant, had each subscribed for \$2,000 of the shares of such stock; that James Elliott, Fred Handle and Herbert Thien had also subscribed for large amounts of capital stock of such proposed company; that he (Baker) had subscribed for \$9,000 of it, and was putting all the money he could get into the stock of the company, whereas, in truth and in fact, he was merely selling stock at twenty-five per cent commission, and not putting any money into it at all; and that such representations (except those referring to Chandler and Tupper) were false. It also alleges that the subscriptions claimed to have been secured from other persons were

grossly exaggerated, and known to be so by Baker; that Baker was in fact the representative of the organization committee of said corporation and its agent in the procurement of subscriptions; that defendant relied upon such representations, and knew nothing to the contrary. On information and belief defendant alleges that prior to the organization of the company, the sale of the note and the time plaintiff became the possessor of it, the defendant canceled his stock subscription. He also alleges that no tender of any capital stock, or anything of value for the note, was ever made by the insurance company. In his prayer, the defendant demands the cancellation and surrender of the note and relief from liability thereon.

The reply to the affirmative defense consists of denials, and direct allegations that plaintiff became the owner of the note in due course before maturity, in good faith, for a valuable consideration, and without notice of the defenses referred to.

At the close of all the testimony, on motion of plaintiff, the court directed a verdict against the defendant, and judgment was entered accordingly. These appeals are from the order denying defendant's motion for a new trial and from the judgment. The making of both orders is specified as error in appellant's brief.

The foregoing, being a *résumé* of the pleadings, and taking, as they do, a wider range than the testimony adduced at the trial, will suffice to cover and dispose of all the questions arising on these appeals.

At the trial the plaintiff produced and identified the note [1] indorsed by the agent of the holder thereof, and, having shown its purchase for value the day following its execution, the burden of proving that Baker obtained the note through fraud rested upon the defendant Snelling. (*Harrington v. Butte & B. M. Co.*, 27 Mont. 1, 69 Pac. 102.) Statements of the character of those made by the officers of the bank months after the purchase of the note for value, and having no bearing upon the original negotiations between Baker and the defendant, in no wise affected the transfer to the plaintiff.

This being so, the liability of the defendant was fixed, until he could, by proper and sufficient pleadings and competent and preponderating proof, show that the note was obtained by means of fraud and deceit practiced by Baker in the procurement of the subscription for which the note was given, and that the plaintiff had knowledge thereof. (*Butte Hardware Co. v. Knox*, 28 Mont. 111, 72 Pac. 301; *Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761; *Ott v. Pace*, 43 Mont., at page 92, 115 Pac. 37.)

We come, then, to the question of the sufficiency of the affirmative defense pleaded by the defendant in his answer. That it falls far short of the requirements of a pleading designed to upset a transaction entered into in apparent good faith, will be seen by a reference to cases dealing with defenses of this character. (*Butte Hardware Co. v. Knox*, *supra*; *Bullard v. Smith*, *supra*; *Ott v. Pace*, *supra*.)

A reference to the evidence in the record will disclose that the alleged misrepresentations of Baker consisted of existing facts, and that the means of testing their accuracy were available to the defendant if he had chosen to investigate them for himself. With his contract, however, he seems to have been quite contented, for he testified: "I made no effort to investigate any of the statements Mr. Baker made to me." The other statements alleged to have been made, consisted merely [3] of prophecies. Could the defendant, then, hope to successfully defend against the note if he had been able to prove to the satisfaction of the jury all that he alleges in his affirmative defense? We think not. Unfortunately for him, neither fantastic representations of things not actually existent, nor promises for the future amount in law to deceit or fraud. (*Pollard v. McKenney*, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; *Beard v. Bliley*, 3 Colo. App. 479, 34 Pac. 271; 20 Cyc. 20.) Statements no less alluring are undoubtedly made every day concerning the prospective value of mining stock, and in the promotion of enterprises of like nature; and, seductive as they may appear, without the interposition of misrepresentation,

with a fraudulent design, their authors are not chargeable with actionable deceit. "To be such, it must relate to a present or past state of facts." (*Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.) Not until the institution of suit on the note in the hands of a third person, did the defendant seek relief from what he now accounts a bad bargain. The courts cannot be called into action in aid of a party whose cupidity has outrun his business judgment.

The judgment and order are affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY  
concur.

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MCKEEN ET AL., APPELLANTS, v. BROOKS, RESPONDENT.

(No. 3,967.)

(Submitted January 10, 1919. Decided February 15, 1919.)

[177 Pac. 745.]

*Landlord and Tenant—Contract of Lease—Construction—Sale  
of Property—Right to Possession—Rights of Tenant.*

Landlord and Tenant—Improvements by Tenant—Compensation by Landlord—Rule.

1. It is the general rule that in the absence of a special agreement to that effect, a tenant cannot, by erecting buildings or making other improvements upon leased property, impose upon the landlord the burden of making compensation for such improvements.

[As to tenant's right to be allowed for improvements, see note in 81 Am. St. Rep. 181.]

Same—Leases—Sale of Premises—Disturbing Possession—Damages—Liability.

2. Where a lease reserved in the lessor the right to sell the property before the end of the term, but provided that if the lessees should be disturbed in their possession "on account of said sale," the lessor should reimburse them for the original cost of improvements made by them, the contract held to have contemplated a disturbance of the lessees' possession by reason of a sale made under such circumstances that the purchaser might rightfully demand possession before the expiration of the term, and not one based upon a wrongful act of the purchaser.

Same—Sale of Property—Right to Possession.

3. In the absence of an agreement to the contrary, a purchaser of realty held by another under an unexpired lease is not entitled to im-

mediate possession, if he had actual or constructive knowledge of the lease at the time of his purchase.

Same—Sale of Property—Rights of Lessees—Constructive Notice.

4. A purchaser of real property which was then in the actual possession of lessees, was charged with knowledge of any interest which they could establish.

Same—Sale of Property—Possession—Rights of Tenants.

5. Where a purchaser of real property had both actual and constructive notice of an unexpired lease of the premises, and there was no agreement between him and the seller for possession prior to the expiration of the term, he was not entitled to demand possession and the lessees were not required to obey his notice to quit, but could maintain an action for damages against anyone who invaded their possession.

Same—Sale of Leased Premises—Wrongful Demand for Possession—Effect.

6. A landlord was not answerable in damages to his tenants under a contract of lease which provided that if they were disturbed in their possession on account of a sale of the premises, he would reimburse them for certain improvements made by them, where, after a sale subject to the rights of the tenants under the lease, the purchaser, without the landlord's knowledge or sanction, wrongfully demanded, and the tenants mistakenly surrendered, possession.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

ACTION by J. L. McKeen and another against John Brooks. From a judgment for defendant, and an order denying them a new trial, plaintiffs appeal. Affirmed.

*Mr. E. K. Cheadle*, for Appellants, submitted a brief, and argued the cause orally.

*Messrs. Belden & De Kalb*, for Respondent, submitted a brief; *Mr. E. M. Hall*, of Counsel, argued the cause orally.

A sale of itself does not operate to terminate a tenancy. It does not matter to the tenant where the fee-simple title is vested. This rule of law has been established since feudal times. During the feudal times a sale terminated the tenancy if the tenant so desired. But if he attorned to the purchaser it did not so operate. This rule no longer exists. (*Tiffany on Landlord & Tenant*, pp. 873, 874; *Rev. Codes*, sec. 4625.) In the absence of an agreement, some covenants run with the land. All covenants running with the land bind the new landlord



and the lessee identically as they bound the lessee and his original landlord. They are both bound by the covenants of the contract to the same extent and as fully and exactly as though they had themselves solemnly entered into them. (11 Cyc. 1095.) The sale here carried with it all of, but none other than, the covenants running with the land. It did not carry with it the covenant in this case, for if it did, it carried away plaintiffs' right of action against Brooks. Under plaintiffs' own theory, if such were their theory, they would be non-suited. But they treat this as a personal covenant; they treat it as one not running with the land, but one remaining and existing between themselves and Brooks. The tenants had the right to retain possession until paid for their improvements. If the particular covenant is a personal one, then Brooks alone had reserved to him the right to terminate the tenancy and incur the penalty. (*McClung v. McPherson*, 47 Or. 73, 81 Pac. 567, 82 Pac. 13.) This right did not belong to plaintiffs.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In May, 1912, John Brooks, the owner of certain real estate, leased the property to McKeen and Friedlein for the term of three years. The lessees were authorized, at their own expense, to inclose the property and to erect necessary buildings thereon to render it available as an amusement park. The original cost of these improvements was \$1,547.45, and the property was devoted to the purpose intended for the seasons 1912 and 1913. In April, 1913, Brooks sold the property, and in January, 1914, the purchaser demanded possession from the lessees, who thereupon surrendered possession and brought this action to recover from Brooks the original cost of the improvements which they had placed upon the property. Defendant prevailed in the lower court, and plaintiffs appealed from the judgment and from an order denying them a new trial.

It is the general rule that in the absence of a special agree-  
[1] ment the tenant cannot, by erecting buildings or making

other improvements upon the leased property, impose upon the landlord the burden of making compensation for such improvements. (2 Tiffany on Landlord & Tenant, sec. 270.) The rule is recognized in this instance, but it is insisted that by contract the lessor bound himself to pay for the improvements originally placed upon this property by the lessees.

The rights of the parties are to be determined by reference [2] to that provision of the lease which reads as follows: "This lease may be terminated prior to the expiration of the term hereinbefore specified in case of sale of said real property by said party of the first part [Brooks], and it is hereby agreed by all parties hereto that said party of the first part has the right to make sale of said real property at any time but in case of sale by said party of the first part prior to the expiration of the said term of three years, then in the event that the said parties of the second part [McKeen & Friedlein] shall be disturbed for or on account of said sale in their possession of the said leased premises, said first party shall reimburse the said parties of the second part for the original cost of the improvements placed upon the said leased premises," etc.

The single question for decision is: Under what circumstances did the lessor agree to become liable to the lessees for the original cost of their improvements?

It is clear that a sale of the premises of itself did not render him liable; neither did the fact that the lessees were disturbed in their possession. To fasten responsibility upon him, it required a sale before the expiration of the lease and a disturbance of the lessees' possession "for or on account of said sale." In the connection in which it is used, the word "for" cannot be given any meaning whatever, but the phrase "on account of said sale" furnishes the key to the solution of the question. As here used, it means "by reason of" (6 Words and Phrases, 4968; *Brown v. German-American T. & T. Co.*, 174 Pa. 443, 34 Atl. 335), or "as the direct and proximate result of" (1 Words and Phrases, Second Series, 546; *Houston & Tex. C. R. R. Co. v. Anglin*, 45 Tex. Civ. App. 41, 99 S. W. 897).

We will not indulge the presumption that the parties to the lease assumed that if a sale was made, the purchaser would commit a tort; and therefore the phrase "on account of said sale" ought not to be extended in its meaning to cover the case of a wrongful disturbance of the lessees' possession; on the contrary, the parties must have had in contemplation a sale made under such circumstances that the purchaser might rightfully demand possession before the expiration of the term.

We are unable to agree with counsel that the provision in the lease quoted above is in effect a covenant for quiet enjoyment. Instead of assuring quiet enjoyment, the lessor reserved to himself the right to disturb the possession of the lessees before the expiration of the lease, in consideration that he should pay the original cost of improvements, if he did so. Apparently the parties all understood that a sale might be made under such circumstances that the purchaser would not be entitled to possession until the expiration of the lease, or, again, that the lessor might be required to deliver possession immediately in order to effect a sale, and in the latter event the lessees agreed to surrender possession and accept the original cost of their improvements as compensation for the relinquishment. Under no other circumstances do we think it can be said that the sale would be the direct and proximate cause of the disturbance of the lessees' possession.

The phrase "on account of said sale" appears to have been used advisedly for the purpose of limiting the lessor's liability to the particular combination of circumstances indicated, *viz.*, a sale coupled with a rightful demand for possession.

In the absence of an agreement, the purchaser of these [3] premises was not entitled to possession as against the lessees, if he had knowledge—actual or constructive—of the lease, but he purchased subject to it, and the rights of the lessees were not affected. (24 Cyc. 926; 1 Tiffany on Landlord & Tenant, sec. 146.)

The record disclosed that at the time of the sale, the lessees [4] were in possession of the property, and the purchaser was

thereby charged with knowledge of any interest which they could establish (*Baum v. Northern Pac. Ry. Co.*, *ante*, p. 219, 175 Pac. 872), and in addition he had actual knowledge of the outstanding lease, and it is not contended that there was any agreement with the lessor for possession prior to the expiration [5] of the term. Under these circumstances, the purchaser was not entitled to demand possession, and the lessees were not required to obey the notice to quit. While they did not own any interest in the fee, they were the owners of the use of the premises during the term of their lease, or until it was extinguished as provided for in the contract (16 R. C. L. 676), and could maintain an action for damages against anyone who invaded their possession.

The landlord is not liable to the tenant for the wrongful acts [6] of a third person which he has not sanctioned or authorized (24 Cyc. 1056), and the record in this instance discloses that Brooks had no knowledge of the act of the purchaser in demanding possession, and was not in any sense responsible for it.

If we assume for present purposes that by the terms of this lease the lessees were given an option to terminate it upon a sale by the lessor, this fact would only reflect upon their liability for future rent, and not upon the liability of Brooks for their initial expenditure. The language cannot be construed to mean that the liability of the lessor attached upon a termination of the lease. By the express terms of the contract his liability was contingent upon a sale, coupled with a disturbance of the lessees' possession "on account of said sale."

We think the trial court was correct in its conclusion that the lessees were not disturbed in their possession as the direct and proximate result of the sale by Brooks, and that they cannot recover in this action.

The judgment and order are affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

DE FORREST, TRUSTEE, ETC., RESPONDENT, v. CRANE &  
ORDWAY CO., APPELLANT.

(No. 3,963.)

(Submitted January 9, 1919. Decided February 20, 1919.)

[178 Pac. 291.]

*Bankruptcy — Unlawful Preferences — Evidence — Defenses—  
Instructions.***Bankruptcy—"Preference"—Definition.**

1. A "preference," within the meaning of the Bankruptcy Act (32 U. S. Stats. at Large, 799), is a transfer of the bankrupt's property by means of which a creditor is enabled to obtain a greater percentage of his debt than other of the bankrupt's creditors.

[As to preferences as avoiding composition with creditors, see note in *Ann. Cas.* 1914A, 845.]

**Same—What not Unlawful Preference.**

2. Though a transfer of a bankrupt's property may amount to a preference, it is not unlawful in the sense that it may be avoided by the trustee in bankruptcy if made within a specified time, unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference.

**Same—Preference—How Made.**

3. To constitute a transfer of a bankrupt's property an unlawful preference, it is not necessary that it be made directly to the creditor; if it is made by another for his benefit, it falls within the prohibition of the Bankruptcy Act.

**Same—Preference—Evidence—Insufficiency.**

4. Where the evidence was insufficient to show that at the time appellant accepted payment from building contractors for material furnished by it to a subcontractor who thereafter was adjudged a bankrupt, it had reason to believe that preferences were intended thereby, a finding of the jury that appellant did receive preferences *held* unwarranted.

**Same—Preference—Evidence—Sufficiency.**

5. Knowledge in defendant supply company at the time it received payments on accounts due it from one subsequently adjudged a bankrupt, that he then was an absconding insolvent, was sufficient to charge it with notice that it was receiving preferences declared unlawful by the Bankruptcy Act.

**Same—Preference—What not Defense.**

6. Where, in order to enable them to deliver buildings clear of claims of lien, contractors paid for supplies furnished to and remaining unpaid by a subcontractor, who thereafter was adjudged a bankrupt, defendant's contention in an action by a trustee in bankruptcy to recover the payments as unlawful preferences, that the payors bore to the owners of the buildings the relation of sureties or indorsers for the bankrupt and that therefore the payments made by them constituted a discharge of their own liabilities to defendant supply company, and did not amount to preferences, *held* without merit.

**Same—Instructions—Inapplicability.**

7. An instruction that payment of money, due a bankrupt, to the bankrupt's creditor to avoid the possibility of the filing of a material-man's lien by the creditor, would not be a defense in an action to recover the payment as an unlawful preference under the Bankruptcy Act, was proper in the absence of evidence that the defendant had perfected such lien.

*Appeal from District Court, Cascade County; J. B. Leslie, Judge.*

ACTION by Byron De Forrest, as trustee in bankruptcy, of George Wilson, bankrupt, against the Crane & Ordway Company. Judgment for plaintiff. Defendant appeals from the judgment and an order denying its motion for a new trial.

*Messrs. Cooper, Stephenson & Hoover*, for Appellant, submitted a brief; *Mr. W. H. Hoover* argued the cause orally.

There is no evidence that the bankrupt "made a transfer." While the Bankruptcy Act provides that a payment may be a transfer, it still is required that the bankrupt himself should make the payment. (Remington on Bankruptcy, 2d ed., sec. 1329). The evidence relating to the active part which the bankrupt had in the making of these payments was insufficient to justify the jury in finding that he made the payments.

There is no difference between the situation here presented and that of surety or indorser paying the bankrupt's obligation to a creditor, and it has been repeatedly held that such payment does not constitute a preference. This is true although there is an open account between the bankrupt and the surety, whereby the surety sets off the amount paid against the claim of the bankrupt. (*Mason v. National Herkimer County Bank*, 172 Fed. 529, 97 C. C. A. 155; *National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 56 L. Ed. 1042, 32 Sup. Ct. Rep. 633.) It would seem that if a preference has been given to anyone, it is to the three contractors, Hulden, Pappin and Anderson. They may be entitled under the Bankruptcy Act to set off the amount of these payments in an action

by the trustee against them. That is the only way in which the estate of the bankrupt would be diminished, if at all.

A payment by a solvent partner of bankrupt for goods purchased by bankrupt does not give a preference to the creditor. (*In re Hines*, 144 Fed. 543, 547.) A bank is not guilty of receiving a preference where it applies bankrupt's deposits to the payment of a note against the bankrupt. (*New York County Nat. Bank v. Massey*, 192 U. S. 138, 48 L. Ed. 380, 24 Sup. Ct. Rep. 199.) Where the estate of the bankrupt is not diminished, except by reason of a right of set off on the part of the guarantor, there is no preference. (*Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. Ed. 571, 25 Sup. Ct. Rep. 339; *Continental etc. Bank v. Chicago Title & Trust Co.*, 229 U. S. 435, 57 L. Ed. 1268, 33 Sup. Ct. Rep. 829.) A payment by the bankrupt to discharge an equitable lien is not a preference, even though the payment is made before the enforcement of the lien. (*Johnson v. Root Mfg. Co.*, 241 U. S. 160, 60 L. Ed. 934, 36 Sup. Ct. Rep. 520.) It is not a preference for a bank to receive a check from the bankrupt to pay a note where the bank could have exercised its right to take the payment from the bankrupt's deposits. (*Studley v. Boylston National Bank*, 200 Fed. 249, 118 C. C. A. 435, 229 U. S. 523, 57 L. Ed. 1313, 33 Sup. Ct. Rep. 806.)

There is no evidence that the defendant had reasonable cause to believe that the acceptance of any of these payments would effect a preference. (Remington on Bankruptcy, sec. 1395.) It is not enough that the creditor have reasonable cause to believe that the bankrupt is insolvent, as that term is defined by the Bankruptcy Act, but the creditor must also know that there are other creditors and have reasonable cause to believe that they will not be paid in full. (*In re First Nat. Bank*, 155 Fed. 100, 84 C. C. A. 16.) Where there is no evidence that defendant knew of other creditors, the evidence is insufficient to sustain a finding and that a preference was given. (*Stanley v. Pajaro Valley Bank*, 196 Fed. 365, 116 C. C. A. 401; *Grandison v. Robertson*, 220 Fed. 985; *Grant v. First National Bank*, 97

U. S. 80, 24 L. Ed. 971; *Hamilton Nat. Bank v. Balcomb*, 177 Fed. 155, 100 C. C. A. 575.) There is no evidence that defendant knew that Wilson had other creditors.

The evidence was insufficient to justify the verdict as to the Anderson and Pappin payments, because it did not show that the bankrupt was at that time insolvent. (3 R. C. L., p. 273; *Tumlin v. Bryan*, 165 Fed. 166, 21 L. R. A. (n. s.) 960, 91 C. C. A. 200; *Jump v. Bernier*, 221 Mass. 241, 108 N. E. 1027.)

The burden of proof was upon respondent to make out his case in the three particulars above noted. (3 R. C. L., p. 285.)

*Mr. P. A. Heimlich* and *Mr. F. E. Ewald*, for Respondent, submitted a brief; *Mr. Ewald* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This action was brought by plaintiff, as trustee in bankruptcy of George Wilson, to recover from the defendant certain sums of money paid to it by debtors of Wilson within four months prior to the filing of the petition in bankruptcy, whereby, it is alleged, the defendant obtained unlawful preferences over other creditors. The petition was filed by several creditors of Wilson on November 11, 1914, and he was adjudged a bankrupt on January 11, 1915.

During the years 1913 and 1914 Wilson was conducting the business of a plumber at Great Falls. He secured subcontracts from contractors and builders to install the necessary plumbing in buildings in course of construction by them in Great Falls and vicinity. These were A. G. Anderson, Pappin & Son and A. S. Hulden. He obtained supplies of material from the defendant on account. On November 11, 1914, when the petition in bankruptcy was filed he had become largely indebted to the defendant. In order that the contractors might deliver their buildings upon completion free from claims of lien for the materials furnished, they paid to defendant the amounts due



from Wilson to it for materials so furnished for each building. On August 8, 1914, Anderson paid to it on this account \$133.25, and on September 10, \$52.44. On August 11, Pappin & Son paid to it \$100; and on September 16, Hilden paid to it \$86.15, and on October 26, \$113.85, making in all \$200.

Plaintiff in his complaint sought recovery of other sums collected by or paid to defendant on Wilson's account, but during the trial these were eliminated from the case. The jury found for the plaintiff for the several sums above referred to, and judgment was entered accordingly. Defendant has appealed from the judgment and an order denying its motion for a new trial.

The assignment of error upon which defendant mainly relies is that the evidence did not justify the verdict in that it did not show that Wilson had made a transfer; nor that the defendant had reasonable cause to believe that any payment made to it would effect a preference; nor that at the time any payment was made the bankrupt was insolvent.

1. The provisions of the Bankruptcy Law, so far as they are pertinent here, are the following:

"Sec. 60 (a). A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition or after the filing of the petition, and before the adjudication, \* \* \* made a transfer of any of his property, and the effect of the enforcement of \* \* \* such \* \* \* transfer will be to enable any of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class," *etc.*

"Sec. 60 (b). If a bankrupt shall have \* \* \* made a transfer of any of his property, and if, at the time of the transfer, \* \* \* and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and \* \* \* the transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement

of such \* \* \* transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person." (32 U. S. Stats. at Large, 799, 800.)

The first of these sections defines a preference by a bankrupt, [1] to be a transfer of any of the property, the effect of the enforcement of which will enable him to whom the transfer is made to obtain a greater per cent of his debt than other creditors. The second declares that the consequence of such a transfer shall be that it may be avoided by the trustee and the property, or its value, recovered by him for the benefit of the bankrupt's estate, provided the preference was given within the prescribed limit prior to the filing of the petition in bankruptcy, or the adjudication, and the creditor to whom the transfer was made had at the time reason to believe a preference was intended. (*Pirie v. Chicago Title & Trust Co.*, 182 U. S. 438, 45 L. Ed. 1171, 21 Sup. Ct. Rep. 906; *Benedict v. Deshel*, 177 N. Y. 1, 68 N. E. 999; *Swarts v. Fourth Nat. Bank*, 117 Fed. 1, 54 C. C. A. 387; *In re Leech*, 171 Fed. 622, 96 C. C. A. 424; Remington on Bankruptcy, sec. 1277.)

Though a transfer is made which amounts to a preference, [2] yet it is not unlawful within the meaning of section 60 (b), unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference,—that is, to pay him a larger percentage of his claim than others would receive. As pointed out by the court in *Pirie v. Chicago Title & Trust Co.*, *supra*, if reasonable cause for this belief does not exist, the preference cannot be recovered from the creditor by the trustee. Under section 57 (g) of the Act, the creditor may keep it, but if he elects to do so, he is debarred from having any balance of his debt allowed as a participating claim in the estate of the bankrupt. (*Pirie v. Chicago Title & Trust Co.*, *supra*.)

Counsel, conceding that a payment of money by a bankrupt to one of his creditors may be a transfer of property whereby an unlawful preference is given insists that the payments in

question were not made by Wilson himself, nor by his assent or acquiescence, and hence did not come within the ban of the statute. In support of this contention they quote from the text of 1 Remington on Bankruptcy (2d ed.), as follows: "Although intent to prefer is not requisite to constitute a transfer a preference, yet there must be at least some voluntary action on the debtor's part or some assent or acquiescence, to constitute the transaction a 'transfer.' Seizure or appropriation of property by the creditor, or his receipt of it otherwise than by the voluntary act or assent of the debtor, will deprive the transaction of its character as a preference." (Sec. 1329.)

The evidence disclosing the circumstances under which the various payments were made may be epitomized as follows:

Anderson was engaged in the erection of two buildings in Great Falls and a third in the village of Belt. Wilson contracted with him to do the plumbing, the price of all of which aggregated \$675. The contract provided that before he should be obliged to make payment to Wilson, the latter was to present receipts showing that he had paid for all materials which he had obtained from defendant or any other dealer. Anderson paid Wilson in installments as the work progressed, one installment being in cash, the others in checks made payable to defendant. Being bound by his contracts with the owners to deliver the buildings upon completion free from claims of lien for materials, after the first payment, when Wilson demanded money, Anderson insisted on having receipts from the defendant. Wilson not being able to obtain them, Anderson, by his consent, made out checks payable to defendant and delivered them directly to the defendant. The payment made on August 8 was by Wilson's express consent; that made on September 10 was without Wilson's consent, because he at that time had absconded and Anderson made it upon the presumption that he had a right to make it under the permission given him at the time of the earlier payments.

Pappin & Son were engaged in constructing a building at Great Falls. Wilson did the plumbing. When the building

was finished and ready for delivery, a balance of \$100 was due Wilson. He demanded payment but it was refused until he could furnish a receipt from the defendant, showing that all the materials had been paid for. Finally, after some delay, Wilson agreed that the payment might be made by the firm directly to the defendant, and this was done. Wilson was not bound by his contract with Pappin & Son to furnish receipts showing a clearance of the building from a claim of lien.

Hulden, being engaged in the construction of several buildings in Great Falls, contracted with Wilson to do the plumbing. Wilson had been paid everything due him except \$200 for work done on one building which had just been completed. In the meantime Wilson had absconded. Thereafter, on the dates above noted, this amount was paid to the defendant by Hulden. When the last payment was made on October 26, Peters & Smith, attorneys at Great Falls, were threatening to file liens on behalf of the defendant upon the different buildings for the cost of the materials furnished to Wilson. The payment was made to prevent this. Authority had been given Hulden by Wilson, before he absconded, to make these payments, Wilson being unable to furnish receipts from the defendant.

No evidence was introduced which tended directly to show when Wilson became insolvent or when knowledge of his condition was first brought home to the defendant. That he was insolvent at the time the petition in bankruptcy was filed, was conceded by counsel for both parties. Counsel for the defendant also conceded that defendant was informed of Wilson's insolvency as early as September 3.

It is clear that none of the several payments were made [3] directly by Wilson. It is equally clear that the Anderson payment of \$133.25 and the Pappin & Son payment of \$100 were made by his express authority, given when they were made, and that the others were under authority assumed to have been given by Wilson before he absconded. This brings all of them within the rule laid down in the text of Mr. Rem-

ington, *supra*, and constituted them preferences. "To constitute a preference it is not necessary that the transfer be made directly to the creditor. It may be made by another for his benefit. If the bankrupt has made a transfer of his property the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuitry of arrangement will not avail to save it." (*National Bank of Newport v. National Herkimer County Bank*, 225 U. S. 178, 56 L. Ed. 1042, 32 Sup. Ct. Rep. 633.) Whether, therefore, the several payments amounted to unlawful preferences depends upon the answer to the further inquiry whether the defendant had reason to believe that preferences were intended.

As to the payments of August 8 and 11 by Anderson and [4] Pappin & Son we do not think the evidence sufficient to bring them within the ban of section 60 (b), *supra*. There are some circumstances disclosed by the evidence which tend to show that Wilson had become insolvent as early as July 1, 1914; but none of them tend to show that the defendant had any knowledge of his condition prior to September 3, or was aware that he had other creditors. They go no further than to show that Mr. O'Brien, the defendant's manager, who had exclusive control of its business at Great Falls, and Mr. Sausen, its cashier, might have learned of it earlier, but there was no substantial evidence tending to show that they did. It appeared from their testimony that while Mr. O'Brien knew that Wilson had a rating by Dun's Commercial Agency of from \$500 to \$1,000 only, he had undertaken on behalf of defendant to "carry" him in order to give him a start in business, with the expectation that he would finally "make good." Both these witnesses testified that in August they had required him to make a statement of his assets and liabilities, and that his statement then showed that the accounts due and becoming due for work done by him were in excess of his indebtedness due to defendant, and that he was not indebted to anyone else in more than trifling sums. Both explicitly denied that they had knowledge or rea-

son to think that his financial condition was other than he reported it at that time to be. To render a preference unlawful and therefore voidable, it must be shown that the creditor "had reasonable cause to believe that the enforcement of such . . . transfer would effect a preference." The evidence relating to these two payments was wholly insufficient to warrant a recovery of them by the trustee.

As to the other payments the condition was different. At [5] the time defendant received them, it had full knowledge that Wilson was an absconding insolvent. This knowledge necessarily carried with it the further knowledge that he could not pay his creditors the amounts due them and that anyone of them, including itself, receiving a payment would necessarily receive a preference over all the other creditors. There was therefore evidence which justified the jury in finding that the defendant was receiving preferences by means of them which the statute declares unlawful.

Counsel insist, however, that since the contractors were [6] bound by their contracts with the respective owners to deliver the buildings clear of all claims of lien, they bore toward the owners the relation of sureties or indorsers for Wilson; hence payments by them to defendant in the amounts for which the buildings might be encumbered by way of liens did not amount to preferences. The argument is that the payors were merely discharging their own liabilities to the defendant. In support of this contention they cite, among other cases, *National Bank of Newport v. National Herkimer County Bank*, *supra*, and *In re Hines*, 144 Fed. 543. These cases are not in point. The contractors were not bound to the defendant by any engagement as sureties or otherwise to discharge Wilson's indebtedness to it. Nor were they under any obligation to Wilson other than to discharge the indebtedness due from them to him. Anderson had the right under his contract with Wilson to withhold payment until Wilson gave clearance receipts against liens; but he was at liberty to waive the presentation of the receipts and pay directly to defendant the amount due

him, by Wilson's permission. In doing this, Anderson was merely paying indebtedness which he thereby acknowledged was due to Wilson, and was not discharging any obligation due to the defendant from himself. If this were not the result, he did not discharge Wilson's debt at all but made a voluntary payment and is still answerable to the trustee in amounts equal to those so paid.

Neither Pappin & Son nor Hulden sustained any contract relations with the defendant or Wilson, authorizing them to pay Wilson's debts. They merely paid the debts of Wilson by his consent with money due him. True, it may be said that all three contractors paid under a sort of coercion in order to clear the buildings of claims of lien; but in no event could they have discharged Wilson's debts without his consent. They were not induced to make the payments by duress or menace, within the meaning of the Code provisions on the subject (Rev. Codes, secs. 4975, 4976). If there is any principle or rule of law by which the defendant can avoid liability, it has not been suggested by counsel, nor does it suggest itself to us.

In relation to the assignment that there was no evidence tending to show that Wilson was insolvent at the time any of the payments were made, counsel do not insist that the evidence is deficient as to all payments, but limit their claim to the Anderson and Hulden payments made in August. What we have said above with reference to these payments disposes of this contention.

In paragraph 7 of its charge the court instructed the jury, [7] in effect, that payments by any debtor of moneys belonging to Wilson to avoid the possibility of the effect of the filing of a lien for such indebtedness would not be a defense, because there was no evidence tending to show that the defendant ever perfected a lien to any of the sums paid to it. Counsel insist that this was error. The contention is without merit. In the absence of some arrangement by contract between the several contractors and Wilson binding him to clear the buildings of claims of lien or giving them a right to do so in case of his

failure to discharge his obligation, it must be presumed that they chose to rely upon his honesty and fair dealing to secure themselves. Hence they became his debtors and were bound to him alone.

Error is assigned upon several rulings of the court upon questions of evidence. We find no error in any of them.

The order denying defendant a new trial is affirmed. The cause is remanded with directions to the district court to modify the judgment by striking out the Anderson payment of \$133.25 and the Pappin & Son payment of \$100. So modified, the judgment will be affirmed.

*Modified and affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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STATE, RESPONDENT, v. CENTENNIAL BREWING CO.,  
APPELLANT.

(No. 4,350.)

(Submitted February 10, 1919. Decided February 20, 1919.)

[178 Pac. 296.]

*Intoxicating Liquors—Prohibition Law—Statutes and Statutory  
Construction—Rules of Interpretation.*

Intoxicating Liquors — Prohibition Law — "Ardent Spirits" — "Spirituous Liquors."

1. "Ardent spirits" and "spirituous liquors" express the same meaning and are used interchangeably in the prohibition law (Chaps. 143, 175, Laws 1917); hence absolute prohibition against the sale, etc., of ardent spirits, likewise interdicts the sale, etc., of spirituous liquors, without regard to alcoholic content.

Statutes—Amendments—Constitution.

2. An Act which does not assume to be an amendment nor re-enact that portion of a prior statute claimed to be amended by it, does not, under section 25, Article V, of the Constitution, have the effect of an amendment.

Intoxicating Liquors—Statutory Construction—Amendments.

3. Held, that the Enforcement Act (Chap. 143, Laws 1917), which provides the machinery for the enforcement of the prohibition law (Chap. 175, Laws 1917), does not amend the latter Act, either directly



or by implication, so as to make legal the sale of spirituous, vinous, fermented or malt liquors containing less than two per cent of alcohol measured by volume.

**Same—Statutory Construction.**

4. *Held*, that since spirituous, vinous, fermented or malt liquors are beverages, a construction of section 2 of Chapter 143, Laws of 1917, which would have the effect of declaring that their sale is not prohibited if they are incapable of being used as beverages, is not permissible.

**Same—Statutory Construction—Rules of Grammar.**

5. The rule of grammatical construction is an aid in the interpretation of statutes, which, however, must give way if the text of the statute indicates a legislative intention contrary to that which would follow from an application of the rules of grammar.

**Same.**

6. *Held*, that a construction of section 2 of Chapter 143, Laws of 1917, which would result in a definition of "intoxicating liquors," as any spirituous, vinous, fermented or malt liquors which "contains" as much as two per cent of alcohol and which "is" capable of being used as a beverage, offends against the ordinary rules of grammar and is not permissible.

**Statutory Construction—Doctrine of "Last Antecedent."**

7. Under the doctrine of the "last antecedent," resorted to in aid of the interpretation of statutes, a relative clause must be construed to relate to the nearest antecedent that will make sense, unless extension to others more remote is required to arrive at the true purpose of the legislature.

**Intoxicating Liquors—Statutory Construction—Doctrine of "Last Antecedent."**

8. *Held*, under the doctrine of "last antecedent" above, that the clauses, "which contains as much as two *per centum* of alcohol," *etc.*, "and which is capable of being used as a beverage," found in section 2 of Chapter 143, Laws of 1917, defining "intoxicating liquors," qualify "liquor" and "liquid" and not the more remote terms "any spirituous, vinous, fermented or malt liquors."

**Statutory Construction—Duty of Courts.**

9. In construing statutes, courts cannot substitute judicial opinion of expediency for the will of the legislature.

**Intoxicating Liquors—Definition—Power of Legislature.**

10. If the legislature deems it necessary to the proper enforcement of the prohibition law to include within the definition of "intoxicating liquors" beverages which are in themselves harmless, they may be included.

**Same—Prohibition Law—Statutory Construction.**

11. *Held*, that whisky, brandy, gin, rum, wine, ale and spirituous, vinous, fermented or malt liquors, are by section 2, Chapter 143, Laws of 1917, declared intoxicating liquors within the meaning of the prohibition law, without reference to the amount of alcohol contained in them; *held*, further, that every other liquid or liquor—whether medicated, proprietary or patented—likewise falls within the same definition, if such liquor or liquid contains as much as two per cent of alcohol measured by volume and is capable of being used as a beverage.

**Same—Prohibition Law—Nature of Act.**

12. The prohibition law is one of suppression, not of supervision.

**Same—Definition—Omission of "Beer"—Effect.**

13. Since by the prohibition law (Chap. 175, Laws 1917), the sale of beer is prohibited absolutely, and the Enforcement Act (*Id.*, Chap.

143), is not an amendment of the former, the fact that the definition of "intoxicating liquors" in section 2 of the latter statute does not include "beer" is without significance.

Same—Malt Liquor—Sale a Crime.

14. It is a criminal offense in this state to sell malt liquor which contains less than two per cent of alcohol measured by volume.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

THE CENTENNIAL BREWING COMPANY was convicted of a violation of the prohibition law, in selling malt liquor containing less than two per cent of alcohol, and appeals from the judgment of conviction. Affirmed.

*Mr. Fletcher Maddox*, for Appellant, submitted a brief, and argued the cause orally.

The argument of the state is that the qualifying phrase, "which contains as much as two *per centum* of alcohol measured by volume, *etc.*," relates only to the clause immediately preceding; that it is only "any liquor or liquid, whether medicated or not, *etc.*," containing less than two per cent of alcohol that does not fall within the definition. This is a misapplication of the unstable and doubtful doctrine of the "last antecedent." That doctrine which merely requires relative and qualifying words and clauses to be applied to the words or phrase immediately preceding, yields always to the plain intent and purpose of the law and particularly whenever a consideration of the entire Act clearly requires the qualifying clause to extend back to more remote phrases. To accomplish the operation of this doctrine in the present case, counsel for the state arbitrarily divides the liquors enumerated in the definition into three classes,—the first class, which is the specific, definite and known group in which the liquors are called by their right names; then a second class, "any spirituous, vinous, fermented or malt liquor"; then a third class, "any liquor or liquid of any kind or description." This tripartite classification is without logic or reason. It will be observed that there is nothing either in the punctuation or in the use of the conjunctions

to give color to the state's theory. It might be said that the qualifying phrase relates back to and covers all the subjects enumerated in the section. But it is not necessary to so decide, and we do not urge such a construction. Our argument is that the section being divided into specific and general groups or classes of liquors, the qualifying phrase covers the general group immediately preceding and all in that group. The conjunctive clauses are not marked by commas. The whole definition could properly be held to be controlled by the qualifying clause, but it is not necessary to so hold. The words are "gin, rum, wine, ale," and if the legislature had not intended to change the classification at this point from intoxicating liquors to a new class which might or might not be intoxicating according to their alcoholic content, then why was it necessary to use the words "and any" which follow the word "ale?" If the legislature had intended the "which contains" clause to apply only to "liquor or liquid of any kind," all doubt as to such intention could have been removed by omitting the words "and any" before "spirituous." There is nothing to indicate any legislative intent to limit the clause beginning "which contains" to liquor or liquid of any kind. On the other hand, there is everything to indicate that the "which contains" was intended to extend as well to fermented and malt liquor. The absence of beer from the group of specific liquors indicated the purpose to classify beer merely as a malt liquor to be controlled by the "which contains" clause. The maxim of *expressio unius est exclusio alterius*, may be applied in view of this omission. (*State v. St. Louis*, 174 Mo. 125, 61 L. R. A. 593, 72 S. W. 623.) We submit that the doctrine of the last antecedent is unavailing to the state to exclude a malt liquor from the benefit of the two per cent clause.

The legislature has directed that the law be so construed as to bring temperance to the state, and we therefore ask the court to construe section 2 that the declared purpose of the legislature may be accomplished. This may be done by giving all the words, phrases and clauses in section 2 that meaning which best

harmonizes with all other parts of the statute. (36 Cyc., p. 1131; *People v. Strickler*, 25 Cal. App. 60, 142 Pac. 1121.) In *Ex parte Hunnicutt*, 7 Okl. Cr. 213, 123 Pac. 179, it was held that in construing a statute, courts are not bound by punctuation or the grammatical construction of sentences. The object of construction is, if possible, to give effect and purpose to the true meaning of the statute. We therefore feel justified in asking this court, if deemed necessary, to so rearrange the words or clauses of section 2 as to make plain the apparent meaning of the legislature as gathered from the entire scope of the law. (*Ogden v. Saunders*, 12 Wheat. 213, 267, 6 L. Ed. 606, 624.) In the case of *Werckmeister v. Pierce etc. Mfg. Co.*, 63 Fed. 445, the United States circuit court held, that rearrangement of clauses or parts of sentences is justifiable under the most common circumstances, and is especially justifiable in order that the statute may not be read contrary to its plain purpose and general public policy.

We believe that the foregoing decisions of California and Oklahoma will be found conclusive upon the question presented by this appeal.

In a note to *Howard v. Acme Brewing Co.* (143 Ga. 1, 83 S. E. 1096), which is found in Ann. Cas. 1917A, 94, will be found collected a large number of decisions applying and construing prohibition laws. They turn upon statutes radically different from ours and the decisions are in many instances conflicting. Among the cases in the note to the *Acme Case* will be found the decisions relied upon by the state to support this conviction. They may be readily distinguished from the instant case.

In the compilation of the Montana prohibition laws issued by the attorney general's office, we observe the case of *State v. Fargo Bottling Works*, 19 N. D. 396, 26 L. R. A. (n. s.) 872, 124 N. W. 387. The North Dakota definition of intoxicating liquors, after a specific enumeration of many liquors, said: "Or any mixtures of such, or any kind of beverage whatsoever, which, retaining the alcoholic principle or other intoxicating

qualities as a distinctive force, may be used as a beverage and become a substitute for the ordinary intoxicating drinks," etc. The defendant was convicted of selling Purity Malt, containing 1.75 per cent of alcohol. Under the North Dakota law, we concede that the conviction was proper.

*Mr. Geo. H. Stanton*, of Counsel for Appellant, submitted a brief.

Reading the Referendum and the Enforcement Acts together, we find a seeming repugnance, which, if real, must yield to the definition of intoxicating liquors. We find in the Referendum Act the generic term "beer" used as one of the prohibited liquors, while in the phrase defining intoxicating liquors, the word "beer" does not appear, but, instead, the words "fermented or malt liquors" are employed. The legislative purpose and intent, of course, was to define what is meant by the general term "beer," as used in the Referendum Act. "Beer," in the usual acceptation of such term, is a fermented or malt liquor, but fermented or malt liquors are not necessarily "beer." The right of the legislature to define the general terms employed in the Referendum Act is beyond reasonable dispute. In the absence of such definition, that which would constitute beer would be a matter of proof by production of evidence or by analysis. To obviate the necessity of such proof, the legislature wisely defined the general term "beer" by enacting that fermented or malt liquors are intoxicating liquors if the percentage of alcohol therein is as much as two per cent—otherwise not. "The word 'beer' is a generic term which is applied indiscriminately to malt beer, as well as to beer which is made from various extracts and from the roots and other parts of certain plants and the bark of trees; thus, it cannot be said, without specific designation of the kind of beer referred to, that it is an intoxicating liquor." (*State v. Sioux Falls Brewing Co.*, 5 S. D. 39, 26 L. R. A. 138, 58 N. W. 1.) Ardent spirits are well known to be whisky, brandy, gin and rum, as indicated in the definition of intoxicating liquors. It is too clear to admit

of argument that no fermented or malt liquor could be any compound of ardent spirits.

*Mr. S. C. Ford*, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Joseph R. Jackson*, *Mr. N. A. Rotering* and *Mr. Frank L. Riley*, for Respondent, submitted a brief; *Mr. Woody* and *Mr. Rotering* argued the cause orally.

The following cases show the construction given statutes containing language, not identical, but similar to the language contained in section 2 of Chapter 39, and intended for the same purpose, for which we contend: *Sawyer v. Botti*, 147 Iowa, 453, 27 L. R. A. (n. s.) 1007, 124 N. W. 787; *Marks v. State*, 159 Ala. 71, 133 Am. St. Rep. 20, 48 South. 864; *State v. Hemrich*, 93 Wash. 439, L. R. A. 1917B, 962, 161 Pac. 79; *Brown v. State*, 17 Ariz. 314, 152 Pac. 578; *State v. Townley*, 18 N. J. L. 311, 318; *State v. Terry*, 72 N. J. L. 375, 61 Atl. 148, 73 N. J. L. 554, 64 Atl. 113; *Commonwealth v. Snow*, 133 Mass. 575; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *State v. McKenna*, 16 R. I. 398, 17 Atl. 51; *United States v. Cohn*, 2 Ind. Ter. 474, 52 S. W. 38.

Counsel for appellant attempt to lay considerable stress on the fact that the word "beer" is omitted from section 2 of Chapter 143, defining intoxicating liquors, but it was manifestly unnecessary to mention the word "beer" in such section, as it is not only specifically named in the prohibitory law (Chap. 39, Sess. Laws 1915), but it is universally known to be a fermented and malt liquor, of which fact the courts take judicial notice (1 Woollen & Thornton on Intoxicating Liquors, secs. 34, 76); and therefore, by that name, or under the quality and kind by whatever name called, is included fairly and squarely within our prohibition laws. And there can, therefore, be neither "rhyme nor reason" in the contention of counsel that the omission of the word "beer" was made with the express purpose of including it within the class of beverages containing not more than two per centum of alcohol, to-wit, within the patent medicine class.

When the word "beer," without any restriction or qualification, is used in a prohibitory law, it always means and denotes a fermented and malt liquor. (Black on Intoxicating Liquors, sec. 17; 1 Woollen & Thornton on Intoxicating Liquors, secs. 5, 34, 76; 1 Words and Phrases, 1st ed., p. 731 *et seq.*; 1 Words and Phrases, 2d ed., p. 416 *et seq.*) Chapter 143, Sess. Laws 1917, is not a prohibitory law, but merely an enforcement law, as we have said, providing the machinery whereby the prohibitory law may be properly enforced. Yet, according to the contention of appellant, the provisions of the enforcement law would, in effect, restrict, modify and qualify the provisions of the prohibitory law, by permitting the sale of beer containing less than two *per centum* of alcohol measured by volume, although there can be no doubt but what the legislature did not intend in any way, by any provision in the enforcement law, to restrict, qualify or modify any provision of the prohibitory law.

Counsel cannot seriously contend that it is beyond the power of the legislature to make the classification that has been made in the prohibition law and as contended for by the state in the instant case. Admitting that the legislature has such power, its will, in the light of prohibition history, is correctly interpreted by the state. So that there may be no doubt as to the right of the state to so classify beverages; we quote from the notes to the case of *Howard v. Acme Brewing Co.*, reported in Ann. Cas. 1917A, at page 94: "Legislatures have the undoubted right to regulate the manufacture and sale of intoxicating beverages, and in the exercise of this right, to declare what liquors are prohibited, what are intoxicating, and what are not—to designate them by general or special terms, and so to frame and word the law as to prevent the evasion of its provisions. So, when a statute enacted for the purpose of regulating intoxicating liquors described them by such a general term as 'alcoholic,' 'spirituous,' 'malt,' or 'vinous,' the courts frequently hold that a nonintoxicating liquor, which falls within one of the classes enumerated, is included in the inhibition of the statute." (See *Feibelman v. State*, 130 Ala. 122, 30 South. 384; *Dinkins v. State*, 149 Ala.

49, 43 South. 114; *Lambie v. State*, 151 Ala. 86, 44 South. 51; *Bradshaw v. State*, 76 Ark. 562, 89 S. W. 1051; *In re Lockman*, 18 Idaho, 465, 46 L. R. A. (n. s.) 759, 110 Pac. 253; *Sawyer v. Botti*, 147 Iowa, 453, 27 L. R. A. (n. s.) 1007, 124 N. W. 787; *State v. Stickle*, 151 Iowa, 303, 131 N. W. 5; *State v. O'Connell* 99 Me. 61, 58 Atl. 59; *State v. Frederickson*, 101 Me. 37, 115 Am. St. Rep. 295, 8 Ann. Cas. 48, 6 L. R. A. (n. s.) 186, 83 Atl. 535; *Commonwealth v. Dean*, 14 Gray (Mass.), 99; *Commonwealth v. Timothy*, 8 Gray (Mass.), 480; *State v. Gill*, 89 Minn. 502, 95 N. W. 449; *Fuller v. Jackson*, 97 Miss. 237, 30 L. R. A. (n. s.) 1078, 52 South. 873; *Purity Extract etc. Co. v. Lynch*, 100 Miss. 650, 56 South. 316; *Luther v. State*, 83 Neb. 455, 20 L. R. A. (n. s.) 1146, 120 N. W. 125; *v. State*, 83 Neb. 455, 20 L. R. A. (n. s.) 1146, 120 N. W. 125; *State v. Lebreque* (N. H.), 97 Atl. 747; *State v. York, Bottling Works Co.*, 19 N. D. 396, 26 L. R. A. (n. s.) 872, 124 N. W. 387; *State v. Kauffman*, 68 Ohio St. 635, 67 N. E. 1062; *La Follette v. Murray*, 81 Ohio St. 474, 91 N. E. 294; *State v. Walder*, 83 Ohio St. 68, 93 N. E. 531; *Hatfield v. Commonwealth*, 120 Pa. St. 395, 14 Atl. 151; *State v. Spaulding*, 61 Vt. 509, 17 Atl. 844; *Commonwealth v. Goodwin*, 109 Va. 828, 64 S. E. 54; *Commonwealth v. Henry*, 110 Va. 879, 26 L. R. A. (n. s.) 883, 65 S. E. 570.)

In legislation by Congress and by the legislatures of practically all of the states, whether such legislation be prohibitory, local option, or for the purpose of license and regulation, "malt liquor," regardless of whether or not it is intoxicating and regardless of its alcoholic content, has always been classed as an intoxicating liquor and placed in the same class with spirituous and vinous liquors, without qualification or restriction of any kind. (Citing Statutes, federal and state.)

While the general rule is that a penal statute must be strictly construed, such rule does not here apply, since section 1 of the Act in question imposes its own rule of construction, and the court is bound thereby, and should construe the provisions of section 2 liberally and in such a manner that the prohibitory



and the enforcement laws can be made to accomplish their full purpose. (*State v. Hemrich*, 93 Wash. 439, L. R. A. 1917B, 962, 161 Pac. 79; 36 Cyc. 1105 *et seq.*)

If appellant's contention is sound, it makes no difference whether the malt liquors sold were or were not intoxicating, as they contained less than two *per centum* of alcohol; while, on the other hand, if the state's contention is sound, the liquors were prohibited regardless of the amount of alcohol they contained and regardless of whether they were or were not intoxicating. The question whether the malt liquors were or were not intoxicating does not enter into the question in any way. If malt liquors are prohibited regardless of the quantity of alcohol contained therein, the fact that they are not intoxicating does lift the ban, while if they are only prohibited when containing as much as two *per centum* of alcohol, they are not under the ban when containing less than two per cent alcohol, even though they are in fact intoxicating. (*Luther v. State*, 83 Neb. 455, 20 L. R. A. (n. s.) 1146, 120 N. W. 125; *Hatfield v. Commonwealth*, 120 Pa. 395, 14 Atl. 151; *Reyfelt v. State*, 73 Miss. 415, 18 South. 925; *State v. Barron*, 37 Vt. 57; note to *State v. York*, 13 Ann. Cas. 116.)

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

This appeal by the Centennial Brewing Company from a judgment of conviction of a violation of the prohibition law presents for decision the question: Is it a criminal offense in this state to sell malt liquor which contains less than two *per centum* of alcohol measured by volume?

At the general election held in November, 1916, the people, by direct vote, adopted a statute called familiarly the prohibition law. By its terms, any person who manufactures, sells, exchanges, barter, gives or disposes of any ardent spirits or any compound thereof capable of use as a beverage, or any ale, beer, wine or intoxicating liquor of any kind, is guilty of a mis-

demeanor. The Act did not become effective until December 31, 1918. (Chap. 39, Laws 1915; Chap. 175, Laws 1917.)

By an Act approved March 5, 1917 (Chap. 143, Laws 1917), and known as the Enforcement Act, elaborate machinery was provided for the enforcement of the prohibition law, and as one means to that end, section 2 defines intoxicating liquors as follows:

"Sec. 2. The phrase 'intoxicating liquors' shall be held and construed to include whisky, brandy, gin, rum, wine, ale, and any spirituous, vinous, fermented or malt liquors and liquor or liquid of any kind or description, whether medicated or not, and whether proprietary (proprietary), patented or not, which contains as much as two *per centum* of alcohol measured by volume, and which is capable of being used as a beverage."

It is the contention of appellant that the concluding clauses, "which contains as much as two *per centum* of alcohol measured by volume, and which is capable of being used as a beverage," modify the terms spirituous, vinous, fermented or malt liquors and liquor or liquid of any kind, and therefore it is not unlawful to sell spirituous, vinous, fermented or malt liquors which do not contain as much as two *per centum* of alcohol measured by volume, or which are not capable of use as beverages. This contention cannot be upheld.

1. It assumes necessarily that the Enforcement Act amends [1] the prohibition law. To illustrate: By the prohibition law the sale of ardent spirits is prohibited altogether without reference to alcoholic contents, whereas, if appellant's contention be upheld, the sale of *spirituous liquors* containing less than two per cent of alcohol is not prohibited.

"Ardent spirits" and "spirituous liquors" are terms of general use and each has a well-defined, well-understood meaning. In Webster's International Dictionary the term "ardent" is defined as: "Hot or burning; causing a sensation of burning; fiery, as ardent spirits, that is distilled liquors." Century Dictionary—Ardent Spirits: "Distilled alcoholic liquors, as brandy, whisky, gin, rum." Standard Dictionary—Ardent Spirits:

"Alcoholic distilled liquors." Worcester's Dictionary—Ardent Spirits: "A term applied to liquors obtained by distillation such as rum, whisky, brandy and gin." Black's Law Dictionary—Ardent Spirits: "Spirituos or distilled liquors."

"Spirituos liquor means distilled liquor." (1 Woollen & Thornton on the Law of Intoxicating Liquors, sec. 7.) Spirituous—"Containing much alcohol; distilled, whether pure or compounded, as distinguished from fermented; ardent; applied to a liquor for drink." (Century Dictionary.) Spirituous Liquors—"Any intoxicating liquor produced by distillation or by rectifying, compounding or otherwise treating or using distilled alcoholic fluids in distinction from fermented or brewed intoxicating beverages." (Standard Dictionary.) Spirituous Liquors—"These are inflammable liquids produced by distillation and forming an article of commerce." (Black's Law Dictionary; Cyclopedic Law Dictionary.) Spirituous Liquor—"Distilled liquor." (Anderson's Law Dictionary.) The term "spirituous liquor" means distilled liquor. (Black on Intoxicating Liquors, sec. 3.) "Spirituous liquor is that which is in whole or in part composed of alcohol extracted by distillation; whisky, brandy and rum being examples." (15 R. C. L. 249.)

In *Sarlls v. United States*, 152 U. S. 570, 38 L. Ed. 556, 14 Sup. Ct. Rep. 720, the supreme court of the United States approved the definitions as given by Webster, Worcester and Century Dictionaries. In *United States v. Ellis*, 51 Fed. 808, the court, in speaking of these terms used in a prohibition statute, said: "Ardent and spirituous are used indiscriminately as having the same meaning."

There cannot be any question that ardent spirits and spirituous liquors are terms used to express the same meaning, and since by the prohibition law the sale of ardent spirits is prohibited absolutely, the sale of all spirituous liquors is likewise prohibited, without reference to the alcoholic contents, unless the Enforcement Act has amended the prohibition law. But such was not its purpose and is not its effect.

It does not assume to be an amendment and it does not re-  
[2, 3] enact any part of the prohibition law, and for this reason it cannot have the effect of an amendment. Section 25, Article V, of the state Constitution, provides: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only, but so much thereof as is revised, amended or extended shall be re-enacted and published at length." Neither can the doctrine of amendment by implication apply.

2. Appellant's contention leads to a contradiction of terms [4] employed in section 2 of the Enforcement Act. Reduced to its simplest form, the contention amounts to this:

The sale of spirituous, vinous, fermented or malt liquor, not capable of being used as a beverage, is not prohibited. The word "beverage" means a drink or liquor for drinking. (Century Dictionary.) Every one of the terms—spirituous liquor, vinous liquor, fermented or malt liquor—has a well-understood meaning. Every one of those liquors is not merely capable of being used as a beverage, but it is in fact a beverage, and it is a contradiction of terms to speak of spirituous, vinous, fermented or malt liquor, not capable of being used as a beverage.

3. The grammatical construction of the section does not admit [5, 6] of the application of appellant's theory. Under the construction contended for, the sentence would read: The phrase "intoxicating liquors" shall be held and construed to include any spirituous, vinous, fermented or malt liquors which *contains* as much as two *per centum* of alcohol and which is capable of being used as a beverage. In the connection in which they are employed, the words "any," "spirituous," "vinous," "fermented" and "malt" are adjectives, all modifying the noun "liquors," which is plural in number, whereas each of the verbs "contains" and "is" is singular.

The rule of grammatical construction is merely an aid in interpretation, and if the text of the statute indicates a legislative intention contrary to that which would follow from the application of the rules of grammar, then the rule of grammati-

cal construction must give way, but in the absence of a clear intention disclosed by the text, then, as said by this court in *Jay v. School District*, 24 Mont. 219, 61 Pac. 250, "we must elicit the purpose and intent of it [the statute] from the terms and expressions employed, if this is possible, calling to our aid the ordinary rules of grammar."

4. The contention of appellant does violence to another rule [7, 8] of statutory construction. The last antecedent before either of the modifying clauses is *liquor* or *liquid*. It is a rule of law as old as the law itself, that a relative clause shall be construed to relate to the nearest antecedent that will make sense (*Traverse City v. Blair Township*, 190 Mich. 313, Ann. Cas. 1918E, 81, 157 N. W. 81; Endlich on Interpretation of Statutes, sec. 414), or, as more aptly stated: "By what is known as the doctrine of the 'last antecedent,' relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding and are not to be construed as extending to or including others more remote, unless such extension is clearly required by a consideration of the entire Act." (36 Cyc. 1123.) As said of the last preceding rule, this one is merely an aid in interpretation, and, in case of conflict, must give way to the more general rule that the intention of the legislature is to be pursued, if possible, but unless the statute requires a different construction, the rule of the last antecedent is applicable as fairly indicating the true purpose and intent of the lawmakers.

Appellant argues plausibly that no reason can be advanced why a malt liquor containing only one-half of one per cent of alcohol should be under the ban, while a patented medicine containing 1.95 per cent of alcohol and capable of being used as a beverage is suffered to be sold. We confess our inability [9, 10] to justify the apparent discrimination; but this furnishes no reason for a construction of the language contrary to its manifest import. We cannot substitute judicial opinion of expediency for the will of the legislature. It is too well settled now to be open to argument that it is within the province

of the legislature to define the term "intoxicating liquors," and, if it is deemed necessary, in order to avoid subterfuges and frauds which fetter the effective enforcement of the law, to include within the definition beverages which are in themselves innocuous, they may be included. (1 Woollen & Thornton on Intoxicating Liquors, sec. 114; *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 57 L. Ed. 184, 33 Sup. Ct. Rep. 44.) In that case the court said: "It is well established that, when a state exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the government."

In our judgment, the meaning of section 2 above is perfectly clear. Whisky, brandy, gin, rum, wine, ale, spirituous liquors, vinous liquors, fermented or malt liquors, as those terms are generally understood, are all declared to be intoxicating liquors within the meaning of the prohibition law, and that, too, without reference to the amount of alcohol contained in them. Every other liquor or liquid of whatever kind or description, whether medicated, proprietary or patented, is likewise within the same definition if it contains as much as two *per centum* of alcohol measured by volume, and is capable of being used as a beverage. This construction harmonizes the two statutes and treats the Enforcement Act as a supplement to, and not as an amendment of, the prohibition law. It makes a grammatically correct sentence of the section and avoids any contradiction in terms. It applies the relative clauses to the last antecedent and, above all other considerations, it gives force and effect to the manifest purpose of the lawmakers.

The Act adopted by the people in November, 1916, is not in any sense a statute regulating the liquor traffic. Its avowed

purpose is to outlaw a business theretofore regulated by license legislation. The title of the Act indicates its purpose. "An Act prohibiting the introduction into, the manufacture of, and the giving, exchanging, bartering, selling, or disposing of ardent spirits, ale, beer, wine or intoxicating liquors within the state of Montana," *etc.*

The manufacture and sale of denatured alcohol, alcohol for scientific or manufacturing purposes and wine intended for the sacrament are specifically excepted from the operation of the law, but, with these exceptions, the sale of everything which falls within the fair import of the terms employed is prohibited [12] absolutely. The statute was clearly designed as one of suppression and not of supervision. As indicated beyond cavil, the purpose of section 2 above is to aid in the enforcement of the prohibition law by making certain that which was deemed to be uncertain—by giving to the term "intoxicating liquors" a definition so comprehensive as effectually to forestall every attempt at evasion by any subterfuge whatever.

Long before either of these statutes was enacted, legislative and judicial history had disclosed that the ingenuity of man can devise almost limitless means for evading a prohibition law; that any beverage by name may be counterfeited, and that the use of such general terms as "intoxicating liquors" only leads to confusion and a practical annulment of the law itself, and with this history and experience before them, the members of the legislative assembly in 1917 undertook the enactment of Chapter 143 to render the prohibition law effective and its enforcement a matter of reasonable certainty.

No importance whatever can be attached to the fact that in [13] defining intoxicating liquors in section 2 of the Enforcement Act, the term "beer" by name is omitted. As heretofore observed, this Act is not in any sense an amendment of the prohibition law, and by that law the sale of beer is prohibited absolutely. It could have been only out of abundance of caution that any liquor was designated by name. The concluding clauses of that section were not designed to exempt from the

operation of the prohibition law any liquor properly so called. They were designated to mark the deadline beyond which bitters, drugs and other patented and proprietary medicines and nostrums, under whatever name or description, might not become the vehicle for a continuation of the traffic in alcoholic beverages. The legislature doubtless concluded that the alcoholic contents of these preparations—less than two per cent—would be so far neutralized by the other ingredients as to render them practically harmless as beverages.

No useful purpose could be served by a review of the all but limitless number of adjudicated cases construing prohibition laws. The statutes of the several states differ so materially in the language employed that the construction of one is of little aid in the interpretation of another. Furthermore, there is a conflict among the authorities construing somewhat similar statutes

In *People v. Strickler*, 25 Cal. App. 60, 142 Pac. 1121, the court was called upon to construe a section of the local option law which reads as follows: "The term 'alcoholic liquors' as used in this Act, shall include spirituous, vinous and malt liquors, and any other liquor or mixture of liquors which contain one per cent by volume, or more, of alcohol, and which is not so mixed with other drugs as to prevent its use as a beverage." The rule of the last antecedent was disregarded, and it was held that the clause "which contain one per cent per volume, or more, of alcohol," modifies the terms "spirituous, vinous and malt liquors" as well as the terms "liquor" or "mixture of liquors."

In *State v. Hemrich*, 93 Wash. 439, L. R. A. 1917B, 962, 161 Pac. 79, the Washington supreme court construed a section of the prohibition law which provides: "The phrase 'intoxicating liquor,' wherever used in this Act, shall be held and construed to include whisky, brandy, gin, rum, wine, ale, beer and any spirituous, vinous, fermented or malt liquor, and every other liquor or liquid containing intoxicating properties." The doctrine of the last antecedent was applied, and it was held that



the phrase "containing intoxicating properties" modifies the terms "other liquor or liquid," and does not modify any of the other preceding terms.

The strained construction given to the statute considered in *Ex parte Hunnicutt*, 7 Okl. Cr. 213, 123 Pac. 179, may have been justified under the circumstances, but the reasoning by which the conclusion was reached does not commend it to our judgment. None of the decisions is particularly persuasive here.

Under the construction of these statutes which we have [14] adopted, it is a criminal offense in this state to sell malt liquor which contains less than two *per centum* of alcohol.

In passing, we may observe that section 2 of the Enforcement Act, in so far as it includes malt liquors within the definition of intoxicating liquors, is to be construed according to the approved usage of the language (Rev. Codes, sec. 15), that is to say, "malt liquor" having acquired a well-defined meaning, will be held to have been used by the legislature to indicate an alcoholic beverage,—the percentage of alcohol being immaterial. (*State v. Hemrich*, above.)

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

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STATE, APPELLANT, v. SCHOENBORN, RESPONDENT.

(No. 3,962.)

(Submitted January 11, 1919. Decided March 3, 1919.)

[178 Pac. 294.]

*Criminal Law — New Trial — Appeal and Error — Burden on Appellant — Presumptions.*

New Trial—Setting Aside Order—Showing Necessary.

1. It is only upon a very strong showing that the supreme court will on appeal set aside an order granting a new trial.

Same—Criminal Law—Appeal—Extent of Review.

2. Where, on appeal by the state from an order granting defendant a new trial on the ground that the verdict returned was contrary to

the evidence, it appears that the judge who tried the cause also granted the motion, the supreme court is limited in its review to an examination of the record to ascertain whether there is a substantial conflict in the evidence, or an absence of evidence necessary to make out a case.

Same—Criminal Law—Appeal and Error—Duty of Appellant.

3. An order granting a new trial to defendant in a criminal cause made by a district judge other than the one who tried it, on the ground that the verdict was contrary to the evidence, required a determination of the weight of the evidence—an exercise of judicial function—and the burden of showing that the district judge could not, in the exercise of sound judgment, conclude from the record that the evidence was insufficient to justify the verdict was upon the state.

Same—Criminal Law—When Defendant Entitled to Retrial.

4. To secure a new trial a convicted defendant in a criminal case is not required to show an entire absence of evidence of some fact necessary to make out a case; if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a retrial.

Appeal and Error—Presumptions.

5. In entering upon its consideration of an appeal, the supreme court indulges the presumption that the judgment or order from which the appeal is taken is correct, the burden being upon appellant to show reversible error.

*Appeal from District Court, Phillips County, in the Seventeenth Judicial District; T. A. Thompson, Judge of the Eleventh District, presiding.*

THEODORE E. SCHOENBORN was convicted of a felony. From an order granting him a new trial, the state appeals. Affirmed.

*Mr. Jos. B. Poindexter*, Attorney General, and *Mr. E. D. Phelan*, for Appellant, submitted a brief; *Mr. Phelan* argued the cause orally.

No appearance on behalf of Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

The defendant was convicted of a felony and the state has appealed from an order granting him a new trial.

Several of the statutory grounds are mentioned in the motion, but in this court the argument in support of the ruling is confined to one, *viz.*: The verdict is contrary to the evidence.

In 1863 the supreme court of California said: "It is only in [1] rare instances and upon very strong grounds that this

court will set aside an order granting a new trial." The language was quoted with approval by this court in *McCauley v. Tyler*, 11 Mont. 51, 27 Pac. 391, and the principle has been adhered to consistently since that case was decided. (See *Gibson v. Morris State Bank*, 49 Mont. 60, 140 Pac. 76.)

If the same judge who presided at the trial had presided [2] when the motion was granted, our review would be limited to an examination of the record to ascertain whether there is disclosed a substantial conflict in the evidence or an absence of evidence necessary to make out a case. (*State v. Foster*, 26 Mont. 71, 66 Pac. 565.) But Judge Utter, who presided in court when the motion for a new trial was heard and sustained, did not preside at the trial of the cause, and for this reason it is suggested that a different rule should govern our review of the order.

The right of a defendant who has been convicted, to move for a new trial upon the ground that the verdict is contrary to the evidence, is one conferred upon him—to the exclusion of the state—by statute (sec. 9350, Rev. Codes), and the authority of the district court to grant the motion is confirmed by the same section, and that, too, without reference to the fact that a different judge may preside at the hearing of the motion, [3] from the one who presided at the trial. It may be conceded that by reason of the fact that Judge Utter could not be aided by any impressions received from the testimony of living witnesses, the order is not entitled to the support of all the presumptions which would have attached to it if the same judge who heard the motion had presided at the trial; still, after making every proper allowance for the judge's disadvantageous position, the court was required to exercise judicial functions—to determine whether, upon the record, the verdict was contrary to the evidence. (*In re Williams' Estate*, 50 Mont. 142, 145 Pac. 957.)

In civil actions, a new trial may be granted for "insufficiency of the evidence to justify the verdict." (Sec. 6794, Rev. Codes.) This language has been uniformly held to require the

court to grant a new trial if in its judgment the weight of the evidence does not justify the verdict. (*Hamilton v. Monidah Trust*, 39 Mont. 269, 102 Pac. 335; *Harrington v. Butte & B. Min. Co.*, 27 Mont. 1, 69 Pac. 102; *Patten v. Hyde*, 23 Mont. 23, 57 Pac. 407.) The expression, "the verdict is contrary to the evidence," has been held to mean the same thing as the expression, "insufficiency of the evidence to justify the verdict." (*Flaherty v. Butte Electric Ry. Co.*, 42 Mont. 89, 111 Pac. 348.)

A defendant in a criminal case who has been convicted is not [4] required to show an entire absence of evidence of some fact necessary to make out a case, in order to secure a new trial; but if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a new trial. The rule is stated generally as follows: A court may grant a new trial in a criminal case whenever in its judgment the conviction is not warranted by the proof. (*Bachman v. People*, 8 Colo. 472, 9 Pac. 42; 16 Corpus Juris, 1179; 12 Cyc. 732.) There is no definite rule of law—no fixed standard—by which to judge of the weight of human testimony, and when the evidence is conflicting, the motion for a new trial upon the ground that the verdict is contrary to the evidence, must of necessity be addressed to the sound judgment of the trial court. (16 Corpus Juris, 1178.) Upon appeal from the order granting or denying the motion, this court sits as a court of error and review, not as a court of original jurisdiction or as an appellate court clothed with authority to try the motion *de novo*. We enter upon our [5] consideration of an appeal indulging the presumption that the judgment or order from which the appeal is taken is correct, and the burden is upon the appellant to show reversible error. (*Rumney Land & C. Co. v. Detroit & M. Cattle Co.*, 19 Mont. 557, 49 Pac. 395; *Haley v. McDermott*, 45 Mont. 217, 121 Pac. 1060; *Dover Lumber Co. v. Whitcomb*, 54 Mont. 141, 168 Pac. 947.) Since the determination upon the weight of the evidence in this instance involved an exercise of judgment,

the state must assume the burden of showing that the record does not present such a case as that Judge Utter in the exercise of sound judgment could conclude that the verdict is contrary to the evidence.

No useful purpose could be served by a review of the evidence. We content ourselves with saying that we have given careful consideration to the entire record, and the state has failed to convince us that the lower court erred in granting the motion.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

**CASES DETERMINED**  
**IN THE**  
**SUPREME COURT**  
**AT THE**  
**MARCH TERM, 1919.**

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**THE HON. THEODORE BRANTLY, Chief Justice.**

**THE HON. WILLIAM L. HOLLOWAY,**  
**THE HON. CHARLES H. COOPER,** } **Associate Justices.**

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**SHEA, APPELLANT, v. NORTH-BUTTE MINING CO. ET AL.,**  
**RESPONDENTS.**

(No. 4,348.)

(Submitted February 10, 1919. Decided March 8, 1919.)

[179 Pac. 499.]

*Workmen's Compensation — Statutes and Statutory Construction — Constitution — Election — Presumptions — Waiver — Industrial Accident Board — Courts — "Judicial Power" — Office and Officers.*

**Workmen's Compensation—Theory of Act.**

1. The theory upon which Workmen's Compensation Acts are placed upon the statute books is that the loss occasioned by reason of an injury to the employee shall not be borne by him alone but directly by the industry itself, and indirectly by the public.

**Same—Constitutionality of Act—Rule for Determining.**

2. The rule that a statute will not be declared invalid on constitutional grounds unless its invalidity is made to appear beyond a reasonable doubt, *held* to apply with particular force where, as in the case of the Workmen's Compensation Act, the statute seems to have been

found satisfactory after a four-year period of operation, by those directly affected by it, to-wit, the employer and the employee.

Same—Constitution—Guaranteeing Access to Courts.

3. *Held*, that the Workmen's Compensation Act (Laws 1915, Chap. 96) is not repugnant to section 6, Article III of the Constitution, as closing access to the courts by the injured employee and compelling him to seek relief through the Industrial Accident Board.

Same—Effect of Election to be Bound by Act.

4. When an employee has elected to become subject to the provisions of the Compensation Act, neither he nor his personal representative in case of the former's death may thereafter prosecute an action for damages against the employer for an injury suffered by him during the course of his employment.

Constitution—Access to Courts—Meaning of Guaranty.

5. Under section 6, Article III, of the Constitution, courts must be accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting, and afford a speedy remedy for every injury which the law recognizes or declares to be actionable.

Personal Injuries—Right of Action—Power of Legislature.

6. The legislature cannot destroy vested rights; therefore where an injury has occurred for which the injured person has a right of action, the legislature cannot deny him a remedy.

Same—Common-law Rules—Legislature may Abolish.

7. No one has a vested right in any rule of the common law; and the technical defenses recognized by it in personal injury actions, such as contributory negligence, assumption of risk, etc., as well as technical rights of action arising out of the negligence of the employer, may be abolished or modified by the legislature without transgressing any constitutional guaranty.

Workmen's Compensation—Effect of Election to be Bound by Act.

8. Inasmuch as the Compensation Act (Laws 1915, Chap. 96) becomes binding upon the employer and employee only at their election, neither may thereafter object to its enforcement, and the fact that the modes in which they may indicate their election is different, does not make it objectionable on the ground that it discriminates against either employer or employee.

[As to right to and effect of election with respect to acceptance of provisions of Workmen's Compensation Act, see note in *Ann. Cas.* 1918B, 715.]

Legislation—Who may Waive Benefit of.

9. A party may waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver does not violate public policy.

Legislature—Power to Establish Presumptions.

10. The legislature may establish presumptions (and rules relating to the burden of proof), provided they are not unreasonable and not conclusive of the rights of parties.

Workmen's Compensation—Election—Presumptions.

11. The silence of an employee, when given an opportunity to elect whether he will be bound or not bound by the provisions of the Workmen's Compensation Law, establishes a presumption that he elects to become subject to it.

Same—Right of Action—Waiver.

12. It is competent for a party to waive his right to have a cause of action determined by a court before it actually arises, especially

where the legislature has provided a substitute remedy,—as it has under the Compensation Act,—which renders his right to relief absolute.

Same—Industrial Accident Board not Court—Constitution.

13. Held, that the Industrial Accident Board is not a court within the meaning of the Constitution, it not being vested with judicial power, but is a ministerial and administrative body with incidental quasi-judicial powers.

Constitution—"Judicial Power"—Definition.

14. "Judicial power," within the meaning of section 1, Article VIII, of the Constitution, is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.

Same—Statutes—Who may not Assail.

15. One not injured by the provision of an Act deemed by him unconstitutional is not in position to assail it.

Same—Statutes—Part Valid and Part Invalid—Effect.

16. Where, after elimination of that portion of a statute which is invalid, sufficient remains to render it operative and reasonably effective to carry out the main purpose of the legislature in enacting it, courts must to that extent uphold it.

Workmen's Compensation—Industrial Accident Board—State Auditor—Holding Two Offices—Power of Legislature.

17. The fact that the state auditor is a member of the Industrial Accident Board does not render the Compensation Act unconstitutional on the ground that he thus holds two offices, since the only limitation upon the legislature in imposing duties upon that officer, under section 1, Article IV, of the Constitution, prohibits the imposition of duties appertaining to the legislative or judicial—not the executive—departments of government.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

ACTION by Murty Shea against the North-Butte Mining Company, a corporation, and Norman Braly. Judgment for defendants dismissing the action. Plaintiff appeals. Affirmed.

*Messrs. Maury & Melzner, Mr. H. H. Parsons, Mr. E. K. Cheadle, Mr. W. D. Rankin and Mr. B. K. Wheeler, for Appellant, submitted an original and a supplemental brief; Mr. H. L. Maury argued the cause orally.*

*Mr. L. O. Evans, Mr. W. B. Rodgers and Mr. D. M. Kelly, for Respondents, submitted a brief; Mr. Rodgers argued the cause orally.*

The method of election provided for in our Workmen's Compensation Act is wholly unobjectionable, and like methods have been repeatedly affirmed by the courts. (*Opinion of the Jus-*



*tices*, 209 Mass. 607, 610, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340, 346; *Sexton v. Newark Dist. Telegraph Co.*, 84 N. J. L. 85, 86 Atl. 451, 454; *Borgnis v. Falk Co.*, 147 Wis. 327, 37 L. R. A. (n. s.) 489, 493, 133 N. W. 209; *Hunter v. Colfax etc. Co.*, 175 Iowa, 245, Ann. Cas. 1917E, 803, L. R. A. 1917D, 15, 154 N. W. 1037, 157 N. W. 145; *Hawkins v. Bleakly*, 243 U. S. 210, Ann. Cas. 1917D, 637, 61 L. Ed. 678, 37 Sup. Ct. Rep. 255; *Mathison v. Minneapolis Street Ry. Co.*, 126 Minn. 286, L. R. A. 1916D, pp. 412, 417, 148 N. W. 71; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, Ann. Cas. 1915A, 241, 104 N. E. 211; *Keeran v. Peoria etc. Traction Co.*, 277 Ill. 413, 115 N. E. 636; *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49, 51; *Middleton v. Texas Power & Light Co.*, 108 Tex. 96, 185 S. W. 556, 557; *State v. Creamer*, 85 Ohio St. 349, 39 L. R. A. (n. s.) 694, 695, 97 N. E. 602.)

Taking into account the unobjectionable character of the election provided for, it follows that the constitutional objections urged by the appellant are not available to an employee who, prior to the happening of an injury, has elected to be bound by the provisions of our Workmen's Compensation Act, when the employer has likewise so elected to be bound thereby. (Cases cited *supra*; *Foster v. Morse*, 132 Mass. 354, 42 Am. Rep. 438; *Porten v. Peterson*, 139 Minn. 152, 166 N. W. 183; *Evanhoff v. State Industrial Acc. Com.*, 78 Or. 503, 154 Pac. 106; *Shade v. Ash Grove L. & P. C. Co.*, 93 Kan. 257, 144 Pac. 249.) The effect of these elective features of Compensation Acts, as touching constitutionality, has also been given force in the case of *Jeffrey Mfg. Co. v. Blagg*, 235 U. S. 571, 59 L. Ed. 364, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570, wherein the supreme court of the United States said: "No employer is obliged to go into this plan. He may stay out of it altogether if he will." (See, also, *Albanese v. Stewart*, 78 Misc. Rep. 581, 138 N. Y. Supp. 942; *Mackin v. Detroit-Timkin Axle Co.*, *supra*.)

The powers conferred upon the Industrial Accident Board are not judicial powers as that term is used in section 1 of Article

VIII of our state Constitution. (*Muskrat v. United States*, 219 U. S. 346, 356, 55 L. Ed. 246, 31 Sup. Ct. Rep. 250; *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49, 53; *Underwood v. McDuffee*, 15 Mich. 361, 93 Am. Dec. 194; *State v. Creamer*, 85 Ohio St. 349, 39 L. R. A. (n. s.) 694, 97 N. E. 602; *Deibeikis v. Link-Belt Co.*, *supra*; *Middleton v. Texas Power & L. Co.*, 108 Tex. 96, 185 S. W. 556; *Menominee Bay Shore Lumber Co. v. Industrial Acc. Com.*, 162 Wis. 344, 156 N. W. 151.)

The provision of the Act appointing the state auditor a member of the Industrial Accident Board does not render the law either unconstitutional, inoperative or void. The only vice suggested in relation to the Industrial Accident Board is that one member, to-wit, the state auditor, is ineligible, by virtue of being such state officer, to fill the position of member of the board. The universal current of authority seems to be that, although ineligible by reason of either legal or constitutional provision, to hold an office, nevertheless the incumbent thereof, actually possessing and exercising its duties, is a *de facto* officer. (*Huyck v. Graham*, 82 Mich. 353, 46 N. W. 781, 782; *Stokes v. Acklen* (Tenn. Ch.), 46 S. W. 316, 317; *In re Corum*, 62 Kan. 271, 84 Am. St. Rep. 382, 62 Pac. 661; *Missouri Pac. Ry. Co. v. Preston*, 63 Kan. 819, 66 Pac. 1050; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231; *Rodman v. Harcourt*, 4 B. Mon. (43 Ky.) 224; *Old Dominion Building & Loan Assn. v. Sohn*, 54 W. Va. 101, 46 S. E. 222; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *Donough v. Dewey (Hollister)*, 82 Mich. 309, 46 N. W. 782, 783.) In the *Donough Case*, *supra*, a woman had been elected inspector of the school district. The law and the Constitution provided for three inspectors. By reason of her sex the woman was constitutionally disqualified to hold the office. It was held that, although ineligible to the office, this woman was a *de facto* officer, and it was also held that inasmuch as two members of the board were authorized to act, and had acted together, their action was legal although it should be ruled that said woman was not an officer *de facto*.

The Act does not violate the constitutional rights of an employee in reference to a jury trial. This question has been set at rest in the case of *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 196, 119 Pac. 554. Although no additional authority is needed, we invite the court's attention to the following: *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, Ann. Cas. 1917D, 642, 61 L. Ed. 685, 37 Sup. Ct. Rep. 260; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A. (n. s.) 466, 117 Pac. 1101; *Sexton v. Newark Dist. Tel. Co.*, *supra*; *State v. Creamer*, *supra*; *Evanhoff v. State Industrial Accident Com.*, *supra*; *Mackin v. Detroit-Timkin Axle Co.*, *supra*; *Deibeikis v. Link-Belt Co.*, *supra*; *Anderson v. Carnegie Steel Co.*, 255 Pa. St. 33, 99 Atl. 215; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Raymond v. Chicago, M. & St. P. Ry. Co.*, 233 Fed. 239, 147 C. C. A. 245; *Hunter v. Colfax Consolidated Coal Co.*, 175 Iowa, 245, Ann. Cas. 1917E, 803, L. R. A. 1917D, 15, 154 N. W. 1037, 157 N. W. 145; *New York Central Ry. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D, 629, L. R. A. 1917D, 1, 61 L. Ed. 667, 37 Sup. Ct. Rep. 247; *Hawkins v. Bleakly*, *supra*.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

The defendant North-Butte Mining Company is a corporation organized under the laws of the state of Minnesota, and is the owner of mining claims which it is engaged in operating in Silver Bow county. When the cause of action upon which recovery is sought herein arose, the defendant Norman Braly was its superintendent. This action was brought to recover damages for a personal injury alleged to have been suffered by the plaintiff through the negligence of the defendants during the course of his employment as a miner. The complaint is in the ordinary form and alleges facts sufficient to sustain a recovery, unless a recovery is precluded by the provisions of the Act passed by the Fourteenth Legislative Assembly commonly known as the Workmen's Compensation Law (Chap. 96, Laws

1915). Denying all the allegations of the complaint charging them with negligence, the defendants alleged as a complete affirmative defense that at the time the plaintiff was injured, the defendant North-Butte Mining Company had elected to become bound by Plan No. 1 of the Workmen's Compensation Law and had performed all the conditions prescribed by the Act to render such election effective; that the plaintiff had also pursuant to the terms of the Act elected to be bound thereby; and that, both plaintiff and defendant North-Butte Mining Company having made their election, the liability of the defendants to compensate the plaintiff for any injury suffered during the course of his employment through any negligent act or omission by them was such only as in that Act provided. To this affirmative defense the plaintiff interposed a general demurrer, which was overruled. Thereupon, the plaintiff refusing to join issue by reply, upon application of defendants his default was entered and judgment rendered and entered against him dismissing the action with costs. From this judgment he has appealed.

Plaintiff does not question the sufficiency of the answer to constitute a defense, provided the Workmen's Compensation Law is valid. Quoting from the brief of counsel: "The only question involved in this case is the constitutionality of the Workmen's Compensation Act."

The causes, from a historical point of view, impelling the enactment of Workmen's Compensation Laws, and the object to be served by them, have heretofore been stated somewhat at length by this court. (*Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 Pac. 554; *Lewis & Clark County v. Industrial Accident Board*, 52 Mont. 6, L. R. A. 1916D, 628, 155 Pac. 268.) It is not necessary to restate them. It is sufficient for present purposes to call to mind that the object sought was to substitute for the imperfect and economically wasteful common-law system by private action by the injured employee for damages for negligent fault on the part of the employer, which, while attended with great delay and

waste, compensated those employees only who were able to establish the proximate connection between the fault and the injury, a system by which every employee in a hazardous industry might receive compensation for any injury suffered by him arising out of and during the course of the employment, whether the employer should be at fault or not, except only when the injury should be caused by the willful act of the employee. In other words, the theory of such legislation [1] is that loss occasioned by reason of injury to the employee shall not be borne by the employee alone—as it was under the common-law system—but directly by the industry itself and indirectly by the public, just as is the deterioration of the buildings, machinery and other appliances necessary to enable the employer to carry on the particular industry.

To every thinking person the object sought commends itself not only as wise from an economic point of view, but also as eminently just and humane. Such legislation, in whatever form it may provide compensation, has been formulated after the most patient study and investigation by our most eminent men in professional and industrial walks of life, in order to avoid such obstructions or limitations as might be encountered [2] under our written constitutions. A persistent enlightened public opinion has brought about the enactment of such laws in a great number of the states of the Union. Some of them are elective, while others are compulsory; and though the validity of many—perhaps all—of them has been challenged on almost every possible constitutional ground, they have generally been upheld. Our own statute is elective. While it has been criticised on the ground that the schedule of rates of compensation provided for by it is not sufficiently liberal and also on the ground that it makes an unwise and unjust discrimination against the dependents of aliens, yet that it operates more justly and more satisfactorily than the old system is demonstrated by the fact that as soon as it became operative, on July 1, 1915, the great body of employers as well as of employees in the various industries in the state accepted

its provisions and have since been subject to them, as administered by the Industrial Accident Board created by the Act for that purpose. Under these circumstances, the rule that an Act of the legislature will not be declared invalid because it is repugnant to some provision of the Constitution unless its invalidity is made to appear beyond a reasonable doubt, applies with peculiar force.

It is said that the Act is repugnant to section 6 of Article III of the Constitution, which declares that "courts of justice shall [3] be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial or delay." The respect wherein the Act is repugnant to this provision is not specifically pointed out, but we gather from the brief of counsel that their objection is that, though the Act is elective, it in effect closes access to the courts by the injured employee and compels him to seek relief, if he can obtain any at all, through the Industrial Accident Board. In other words, since the section declares in express terms that there shall be a judicial remedy for every wrong suffered by one person at the hands of another, it is beyond the power of the legislature to provide any other remedy, though such other remedy is entirely optional.

The Act is very long, and we shall not undertake to quote it. It will be sufficient to state the substance of the provisions which are made the points of attack by counsel. The modes provided by which the election must be made by both the employer and employee are prescribed in sections 3(f), 3(g), 3(h), 3(i) and 3(j). The employer is required to file with the Industrial Accident Board his election in such form as the board shall prescribe. It must state which of the three plans provided for he elects to be bound by, and a notice of it must be posted in a conspicuous place in his place of business, and also a copy of the notice filed with the board, accompanied by an affidavit showing that it has been posted as required. After the employer has made his election by complying with these

requirements, every workman then employed by him or thereafter entering his employment is conclusively presumed to be bound by the Act, unless he elects not to be bound by it. He shall make such election by written notice in the form prescribed by the board, served upon the employer, a copy of which must be filed with the board together with proof of its service. If the employer fails to elect to come under the Act, an ordinary action may be maintained against him for damages for an injury suffered by the employee in the course of his employment or for death resulting from such injury, but the employer may not allege as a defense that the plaintiff was guilty of contributory negligence, or that the injury was caused by the negligence of a fellow-servant, or that the employee had assumed the risk incident to the employment or arising out of the failure of the employer to perform any of his common-law duties. On the other hand, if the employee elects not to be bound after the employer has elected to be bound, all the common-law defenses are available to the employer. It is declared to be the intention of the Act that the employer shall elect to be bound before he becomes subject to it, and that the employee shall be presumed to have elected to be subject to it and under the plan stated by the employer, unless he shall affirmatively elect not to be bound by it. The employee may revoke his election at any time. The employer may make his election at any time. In case he does so he becomes subject to the Act for the remainder of the fiscal year. After having once made his election he is bound for the rest of the fiscal year under the plan first elected, and also for the succeeding years unless within not less than thirty nor more than sixty days before the end of the fiscal year he elects not to be bound by it, or unless, within the same time, he elects to be bound by some one of the other plans. Such election must be made in the same manner as the original election. It is further declared that when both the employer and employee have elected to be bound by the Act its provisions shall be exclusive and the election shall be held to be a surrender by both of their right

"to any other method, form or kind of compensation, or determination thereof, or to any other compensation, or kind of determination thereof, or cause of action, action at law, suit in equity, or statutory or common-law right or remedy, or proceeding whatever, for, or on account of, any personal injury to, or death of such employee," except as such rights are in the Act itself specifically granted. The election shall bind the employee himself and, in case of his death, his personal representative and all other persons claiming under him. The employer is likewise bound, together with those who may conduct his business during liquidation, bankruptcy or insolvency.

Three plans of compensation are provided for, differing in the mode by which benefits or compensation must be paid to the employee. Since no question is made as to the legal propriety of any of these plans or the mode of payment provided under each of them, it is not necessary to notice their distinguishing features.

The Industrial Accident Board consists of three members—the state commissioner of labor and industry, the state auditor, and the chairman, who is appointed by the Governor for a term of four years and receives a salary of \$4,000 per annum. The other members receive no compensation other than their salaries as state officers. A majority of the board constitutes a quorum for the transaction of business. An appeal may be taken to the district court from any award made by the board, by any person affected by it. The trial in the district court must be *de novo*. The court may on good cause shown permit additional evidence to be introduced; otherwise the hearing must be upon the certified record of the proceedings of the board. If no appeal is taken the award of the board is final.

We agree with counsel that when an employee has elected to [4] become subject to the provisions of the Act, he may not thereafter prosecute an action for damages against the employer for an injury suffered by him during the course of his employment; nor may his personal representative prosecute such an action in case of his death. But counsel are in error in sup-



[5] posing that for this reason the Compensation Act is repugnant to the section of the Constitution quoted. Their contention is based upon a misconception of the scope of the guaranty therein contained. A reading of the section discloses that it is addressed exclusively to the courts. The courts are its sole subject matter and it relates directly to the duties of the judicial department of the government. It means no more nor less than that under the provisions of the Constitution and laws constituting them, the courts must be accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting, and afford a speedy remedy for every wrong recognized by law as being remediable in a court. The term "injury" as therein used, means such an injury as the law recognizes or declares to be actionable. Many of the state Constitutions contain similar provisions, and the courts, including our own, have held either expressly or impliedly that their meaning is that above stated. (*Johnson v. Higgins*, 3 Met. (Ky.) (566), foot page 514; *Barkley v. Glover*, 4 Met. (Ky.) (44), foot page 39; *Templeton v. Linn County*, 22 Or. 313, 15 L. R. A. 730, 29 Pac. 795; *Martin's Executrix v. Martin*, 25 Ala. 201, 208; *Cunningham v. City of Denver*, 23 Colo. 18, 58 Am. St. Rep. 212, 45 Pac. 356; *Mountain Timber Co. v. State of Washington*, 243 U. S. 219, Ann. Cas. 1917D, 642, 61 L. Ed. 685, 37 Sup. Ct. Rep. 260; *Middleton v. Texas Power & L. Co.*, 108 Tex. 96, 185 S. W. 556; *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554.) If the contention of counsel should be upheld, the consequence would be that the legislature would be stripped of all power to alter or repeal any portion of the common law relating to accidental injuries or the death of one person by the negligence [6] of another. It is true the legislature cannot destroy vested rights. Where an injury has already occurred for which the injured person has a right of action, the legislature cannot deny him a remedy. But at this late day it cannot be contro- [7] verted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise

in future may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident, so long as there is no impairment of rights already accrued. This necessarily follows from the proposition, well established by the courts everywhere, that no one has a vested right in any rule of the common-law. The technical defenses recognized by it in this class of cases, *viz.*, contributory negligence, assumption of risk, *etc.*, may be abolished or modified without transcending any constitutional guaranty. (*Middleton v. Texas Power & L. Co.*, *supra*; *Mountain Timber Co. v. State of Washington*, *supra*; *Cunningham v. Northwestern Imp. Co.*, *supra*; *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 37 L. R. A. (n. s.) 466, 117 Pac. 1101; *New York Cent. Ry. Co. v. White*, 243 U. S. 188, Ann. Cas. 1917D, 629, L. R. A. 1917D, 1, 61 L. Ed. 667, 37 Sup. Ct. Rep. 247; *Borgnis v. Falk Co.*, 147 Wis. 327, 347, 37 L. R. A. (n. s.) 489, 133 N. W. 209; *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451.) This being so, there is no reason why technical rights of action arising out of the negligence of the employer may not be abolished by the legislature in the same way. And so it is held by the courts of those states which have enacted compensation [8] laws made compulsory, as in new York and Washington. If this is so, for a much stronger reason may it be asserted that there can be no objection to a compensation law which becomes binding upon the employer and employee at their election, but not otherwise. By way of inducement to the employer to accept the Act, it is provided that if he refrains, the technical common-law defenses shall not be available to him. As an inducement to the employee, his guaranty of compensation for any injury arising out of his employment becomes absolute, whereas, if he refuses to accept, he still has his action at law subject to all the common-law defenses. The employer cannot object because he has by his affirmative act elected to waive all objections to the extent of his liability and his obligation to make compensation. The employee cannot thereafter object if he fails to give the required notice of his refusal to accept

the conditions imposed. The difference in the modes by which they may indicate their election is not objectionable on the constitutional ground that it discriminates against either employer or employee. The former is not in this case making any complaint; the latter cannot complain because it was competent for him to waive the advantage of any provision of law which was intended solely for his benefit, so long as the waiver did not violate public policy. (Rev. Codes, sec. 6181; *Parchen v. Chessman*, 49 Mont. 326, Ann. Cas. 1916A, 681, 142 Pac. 631, 146 Pac. 469.) He may waive his right to a jury trial in the manner provided by law (Rev. Codes, sec. 6762; *Chessman v. Hale*, 31 Mont. 577, 3 Ann. Cas. 1038, 68 L. R. A. 410, 79 Pac. 254). No one has ever questioned the power of the legislature to provide a means by which the parties to a controversy may waive a trial by a court and submit the matter to arbitrators selected by themselves, by whose award they are finally concluded in the absence of fraud, gross error, excess of power and the like. (Rev. Codes, sec. 7365 *et seq.*; *Solem v. Connecticut Fire Ins. Co.*, 41 Mont. 351, 109 Pac. 432.) Other illustrative cases might be cited. These, however, are sufficient to show that it is no objection to the legislation that the employee after his election to become subject to the Act is conclusively bound to accept such compensation as may be awarded to him under its provisions. Nor is it a valid objection to it that it provides for a different mode of election by the employee from that provided for the employer. This feature of the legislation has been frequently considered by the courts and has invariably been declared unobjectionable. The following cases are directly in point: *In re Opinion of the Justices*, 209 Mass. 607, 96 N. E. 308; *Young v. Duncan*, 218 Mass. 346, 106 N. E. 1; *Sayles v. Foley*, 38 R. I. 484, 96 Atl. 340; *Sexton v. Newark Dist. Tel. Co.*, *supra*; *Borgnis v. Falk Co.*, *supra*; *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, Ann. Cas. 1917E, 803, L. R. A. 1917D, 15, 154 N. W. 1037, 157 N. W. 145; *Hawkins v. Bleakly*, 243 U. S. 210, Ann. Cas. 1917D, 637, 61 L. Ed. 678, 37 Sup. Ct. Rep. 255; *Mathison v. Minneapolis St. Ry. Co.*, 126

Minn. 286, L. R. A. 1916D, 412, 417, 148 N. W. 71; *Deibeikis v. Link-Belt Co.*, 261 Ill. 454, Ann. Cas. 1915A, 241, 104 N. E. 211; *Mackin v. Detroit-Timkin Axle Co.*, 187 Mich. 8, 153 N. W. 49.

The silence of the employee establishes a presumption that [10, 11] he elects to be subject to the Act. It is clearly within the province of the legislature to establish presumptions and rules relating to the burden of proof, and a statute establishing a presumption of this character is valid, so long as the presumption is not unreasonable and not conclusive of the rights of the parties. (*Bielenberg v. Montana Union Ry. Co.*, 8 Mont. 271, 2 L. R. A. 813, 20 Pac. 314; *Hawkins v. Bleakly*, and other cases cited *supra*.)

But counsel say that it is not competent for a party to waive [12] the right to have his cause of action determined by a court before the cause of action arises. This court has expressly held under our statute (Rev. Codes, sec. 6181) that a party may waive in advance the advantage of the statute of limitations because it was intended solely for his benefit (*Par-chen v. Chessman*, *supra*). If this is true, there seems to be no compelling reason why under the express authority of the legislature he may not at his option waive in advance the advantage of any remedy established solely for his benefit which the legislature itself may abolish, especially when it has provided a substitute remedy which renders his right to relief absolute.

It is argued that the Act is invalid in that it constitutes the [13] Industrial Accident Board a court, whereas the whole judicial power of the state is vested in the courts enumerated in section 1 of Article VIII of the Constitution. Several of its provisions are cited as evidencing the fact that the functions of this body are judicial. The fallacy of this contention is fully demonstrated by the case of *Cunningham v. Northwestern Imp. Co.*, *supra*. That case is decisive of counsel's contention. It is true that many of the functions exercised by the board are judicial in character; but that it is not vested with judicial

power in the sense in which that expression is used in the Constitution becomes clear upon a moment's consideration. As [14] used in the Constitution, the expression "judicial power" means "the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." (Miller on the Constitution, 314.) This power the board does not possess. It was created as a purely administrative body. It may hear evidence to enable it to make an award in a particular case, and to that end may call witnesses; but it is without power to render an enforceable judgment and its determinations and awards are not enforceable by execution or by other process until a judgment has been entered thereon on appeal to a regularly constituted court. (*Mackin v. Detroit-Timkin Axle Co.*, *supra*.) In this case, after considering the Michigan Act, the court said: "We conclude that the Industrial Accident Board is a ministerial and administrative body with incidental quasi-judicial powers, exercised by consent of those electing to be governed by the Act, not vested with powers or duties in violation of constitutional limitations." The same view is announced in the following cases: *Hunter v. Colfax C. Coal Co.*, *supra*; *Borgnis v. Falk Co.*, *supra*; *Deibeikis v. Link-Belt Co.*, *supra*; *Middleton v. Texas Power & L. Co.*, *supra*; *Case of Pigeon* (*Pigeon v. Employers' L. Assur. Corp.*), 216 Mass. 51, Ann. Cas. 1915A, 737, 102 N. E. 932; *Greene v. Caldwell*, 170 Ky. 571, Ann. Cas. 1918A, 604, 186 S. W. 648.

It may be conceded for present purposes that some of the powers vested in the board are such as appertain exclusively to courts; for illustration, the power conferred by sections [15] 18(d) and 18(f) to punish for contempt. Of this, however, the plaintiff cannot complain, as counsel for defendants point out in their brief, for two reasons: In the first place, plaintiff is not about to be tried by the board for a contempt, nor has he been convicted by it. Hence he is in no position to assail these provisions of the Act on constitutional grounds. In [16] the second place, though these provisions are assumed to

be invalid, this assumption does not require the conclusion that any other provision is invalid. Section 24(b) declares: "If any section, subsection, subdivision, sentence, clause, paragraph or phrase of this Act is for any reason held to be unconstitutional or void, such decision shall not affect the validity of the remaining portions of this Act, so long as sufficient remains of the Act to render the same operative and reasonably effective for carrying out the main purpose and intention of the legislature in enacting the same as such purpose and intention may be disclosed by the Act." An examination of the Act in its entirety will disclose that even though the provisions referred to by counsel are eliminated entirely, there is still enough left to accomplish all the purposes for which the legislation was enacted. The district court of the county in which the board happens to be sitting at the time an appeal is taken, which is elsewhere provided for in the Act, has full power to compel the attendance of witnesses and punish them for disregard of subpoenas issued by the board.

The next contention made by counsel is that the board is an [17] unlawful body because the state auditor, one member of it, holds two offices. By this we presume counsel mean that because the auditor is made a member of the board and is required to execute a bond to guarantee the faithful performance of his duties, this constitutes him a public officer, in a capacity other than as state auditor. A complete answer to this contention is found in section 1 of Article VII of the Constitution. This section enumerates the state executive officers. It then provides that they shall perform such duties as are prescribed in the Constitution and by the laws of the state. It is not necessary to refer to the constitutional duties enumerated appertaining to the auditor's office. The only limitation imposed upon the legislature in imposing duties upon the auditor is found in section 1 of Article IV. This prohibits the imposition of duties upon him that appertain to the legislative or judicial departments of the government. So long as

this limitation is not violated, the legislature is at liberty to impose any governmental duty upon this officer.

The other contentions made by counsel are: That the Act denies a jury trial, and that it violates the clause of the Fourteenth Amendment to the Constitution of the United States guaranteeing to the citizen the equal protection of the laws. What we have said above in discussing the other questions heretofore determined, disposes of these contentions.

The judgment of the district court is affirmed.

*Affirmed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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HAYDON, RESPONDENT, v. NORMANDIN, APPELLANT.

(No. 3,961.)

(Submitted January 11, 1919. Decided March 8, 1919.)

[179 Pac. 460.]

*Estates of Deceased Persons—Personal Property—Conversion—  
Actions—Statutes and Statutory Construction—Posthumous  
Children—Rights and Remedies.*

Estates of Deceased Persons—Posthumous Children—Rights and Remedies.

1. For the purpose of defining the civil rights and remedies of a child unborn at the time of the death of its father, it is deemed to have been then living, and therefore enjoys all the rights of inheritance conferred upon a living person.

Same—Intestacy—Right of Heirs to Property.

2. Upon the death of an intestate his property passes immediately to his heirs, subject to the control of the probate court for the purpose of administration.

Statutory Construction—History—Arrangement in Code—Effect.

3. The history of a statute, as well as its arrangement under a proper heading in the Codes upon its adoption from another state, is some evidence of the purpose of the legislature in enacting it.

Same—Adoption of Act from Other State—Rule.

4. Where a statute is adopted from another state after construction by its highest court, the construction thus placed upon it is adopted with it.

[As to construction of adopted statutes, see note in *Ann. Cas.* 1917B, 651.]

Estates of Deceased Persons—Personal Property—Conversion—Right of Action in Heir.

5. *Held*, that section 6462, Revised Codes, authorizing an heir, who at the time of a wrongful conversion of personal property of his testator or intestate was laboring under a disability, to bring his action for damages within five years after the cessation of such disability, acts on the remedy only and does not create a new cause of action nor operate retroactively.

*Appeal from District Court, Powell County; Geo. B. Winston, Judge.*

ACTION by Agnes Haydon against Marie Normandin, as executrix of the last will and testament of Peter Normandin, deceased. Judgment for plaintiff. Defendant appeals. Affirmed.

*Mr. H. W. Rodgers* and *Mr. S. P. Wilson*, for Appellant, submitted a brief, and argued the cause orally.

If a statute creates a new right of action (as does section 6462, Revised Codes), it cannot possibly apply to actions accruing before its enactment. (*Keeley v. Great Northern Ry. Co.*, 139 Wis. 448, 121 N. W. 167.) In the absence of section 6462 Revised Codes of Montana 1907, this action could not have been brought by the next of kin of the intestate. (*Boley v. Griswold*, 2 Mont. 447; *Galvin v. Mutual Savings Bank*, 6 Cal. App. 402, 92 Pac. 322; *Estate of Pina*, 112 Cal. 14, 44 Pac. 332; *Hall v. Cowles' Estate*, 15 Colo. 343, 25 Pac. 705; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80; *Buchanan v. Buchanan*, 75 N. J. Eq. 274, 138 Am. St. Rep. 563, 20 Ann. Cas. 91, 22 L. R. A. (n. s.) 454, 71 Atl. 745.)

That portion of the above section giving a right of action of next of kin where they would not have had such right of action prior to the enactment of such statute, is prospective in its operation and not retrospective. (*Bullard v. Smith*, 28 Mont. 387, 72 Pac. 761; *Bank of Ukiah v. Gibson*, 5 Cal. Unrep. 11, 39 Pac. 1069; *Stewart v. Vandervort*, 34 W. Va. 524, 12 L. R. A. 50, 12 S. E. 736; *Fowler v. Lewis' Admr.*, 36 W. Va. 112, 14 S. E. 447; *In re Pomeroy*, 33 Mont. 69, 81 Pac. 629; *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216; *Smith*



v. *Lyon*, 44 Conn. 175.) We do not know of any authority which would authorize a retroactive effect to a law giving a new cause of action, especially in the absence of any declaration or intention shown by the law that such law should be retrospective in effect.

*Mr. Elmer E. Hershey* and *Messrs. Scharnikow & Jordan*, for Respondent, submitted a brief; *Mr. Hershey* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On November 9, 1894, Charles Normandin died intestate in Deer Lodge (now Powell) county, leaving personal property of the alleged value of \$4,800, and leaving, as his sole heirs at law, his wife and his daughter Agnes, then *en ventre sa mere*. There was never any administration of the estate, but a brother, Peter Normandin, immediately on the death of Charles, took possession of the property and converted it to his own use. On July 13, 1895, the daughter Agnes was born. In May, 1915, Peter Normandin died testate, and Marie Normandin was duly appointed and qualified as executrix of his last will and proceeded with the administration of his estate. In July, 1915, the daughter Agnes, then Agnes Haydon, presented to the executrix a claim for one-half the value of the property so converted. The claim was rejected and this action was commenced in September, 1915. From a judgment in favor of plaintiff, defendant appealed.

It is conceded by counsel for plaintiff that this action must be maintained, if at all, under and by virtue of the provisions of section 6462, Revised Codes, which section reads as follows: "Sec. 6462. For the purpose of computing the time within which an action must be commenced in a court of this state, by an executor or administrator, to recover personal property taken after the death of a testator or intestate, and before the issuing of letters testamentary or letters of administration; or to re-

cover damages for taking, detaining or injuring personal property within the same period, the letters are deemed to have been issued within five years after the death of the testator or intestate. But where an action is barred by this section any of the next of kin, legatees, or creditors, who, at the time of the transaction upon which it might have been founded, was within the age of majority, or insane, or imprisoned on a criminal charge, may, within five years after the cessation of such disability, maintain an action to recover damages by reason thereof, in which he may recover such sum, or the value of such property, as he would have received upon the final distribution of the estate, if an action had been seasonably commenced by the executor or administrator." The statute was first enacted in this state as a part of the Codes and became effective on July 1, 1895, about seven months after the conversion took place and a few days prior to the birth of this plaintiff.

For the purpose of defining her civil rights and remedies, [1] plaintiff is deemed to have been *living* at the time of her father's death, although she was not born until eight months thereafter. (Sec. 552, Probate Practice Act, Comp. Stats. 1887; sec. 4834, Rev. Codes.) She enjoyed all the rights of inheritance conferred upon any living person. (14 Cyc. 39; 14 [2] R. C. L. 216.) Since Charles Normandin died intestate, his property passed immediately upon his death to his wife and daughter, subject to the control of the probate court for the purposes of administration. (Sec. 532, Probate Practice Act, Comp. Stats. 1887.)

If section 6462 can be made applicable to a case of this character, then it must be conceded that plaintiff has brought herself within its provisions, since she labored under the disability of infancy until July, 1913.

Neither at common law nor under the statutes in force prior to July 1, 1895, could an heir at law maintain an action for the wrongful conversion of property belonging to the decedent. The right of action was in the personal representative who was entitled to the possession of the property for the purpose of

administration (secs. 127, 226 and 227, Probate Practice Act, Comp. Stats. 1887), and until there was a personal representative qualified to act, the statute of limitations did not commence to run. (25 Cyc. 1067.) But for section 6462 the plaintiff, upon reaching her majority, could have had an administrator appointed and an appropriate action prosecuted for the conversion of this property. With this statute in force, however, she was confronted with the fact, when she became of age, that although there never was an administrator of her father's estate, the law presumes that one was appointed within five years of his death, and any action which might have been prosecuted by a personal representative, was barred after seven years from November, 1894, or in November, 1901,—twelve years before she reached her majority.

It is the contention of appellant that section 6462 creates a new cause of action in favor of the heir; that it is this new right of action which plaintiff seeks to enforce in this instance; that the statute cannot be given retroactive effect, and, since the property was converted before the statute was enacted, this action cannot be maintained. That argument leads to the conclusion that although plaintiff was wrongfully deprived of her property, she is without recourse, solely because of the fact that during the seven years succeeding her father's death she was unfortunate enough to be an infant. It would be a reproach to the law to say that such a result could be consummated or that in enacting section 6462 the legislature ever intended such a consequence.

The history of the statute furnishes some evidence of its [3] purpose. Section 6462 is practically a literal copy of section 392 of the Code of Civil Procedure of New York. (Code Civ. Proc., New York, 1876, p. 72.) Prior to its enactment it was held that the statute of limitations did not commence to run until an administrator was appointed, no matter how long a period elapsed after the death of the intestate. (*Bucklin v. Ford*, 5 Barb. (N. Y.) 393.) The principle of that case was reiterated in *Sanford v. Sanford*, 62 N. Y. 553, de-

cided in 1875, and the following year section 392 was enacted. Later it came before the court for construction in *Cohen v. Hymes*, 64 Hun, 54, 18 N. Y. Supp. 571, and it was then held that its purpose undoubtedly was to limit the operation of the rule laid down in *Bucklin v. Ford*. In other words, the purpose of the statute was, by force of the presumption created, to fix definite points of time from which the statute of limitations would commence to run. It is to be observed, too, that section 392 is found in the New York Code as a part of Chapter IV, entitled "Limitation of the Time of Enforcing a Civil Remedy." When the section was adopted in our Code of Civil Procedure it was made a part of the statute of limitations under the title, "General Provisions as to the Time of Commencing Actions." This arrangement of the statutes is not a controlling consideration, but is indicative of the legislative intention.

Since the statute had been construed by the New York court [4] before its adoption here, it will be held that our legislature adopted the construction as well as the text (*Miller v. Miller*, 47 Mont. 150, 131 Pac. 23), and that the purpose of its enactment was not to create a new cause of action, but to fix distinct points of time from which the statute of limitations begins to run.

It is true that the statute authorizes a person who theretofore [5] labored under disability, to prosecute the action, but it does not create a new cause of action. The conversion by Peter Normandin gave rise to a cause of action in favor of the administrator of Charles Normandin's estate, but for the use and benefit, ultimately, of this plaintiff to the extent of her interest, and it is that same cause of action for that same interest which section 6462 authorizes this plaintiff to maintain. (*Berry v. Kansas City, Ft. S. & M. R. Co.*, 52 Kan. 759, 39 Am. St. Rep. 371, 34 Pac. 805.)

Our conclusion is that section 6462 operates on the remedy alone; that it does not create a new cause of action; that it does not operate retroactively, but that it affects rights of ac-

tion which might have been enforced at the time it took effect. It is remedial in character and its application to the facts of this case works no hardship on defendant. Peter Normandin acquired no vested right in plaintiff's property by converting it to his own use, and his estate is in no better position than he, to take advantage of his wrong. (36 Cyc. 1216.)

The judgment is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

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STATE, RESPONDENT, v. LUTEY BROS., APPELLANT.

(No. 4,331.)

(Submitted January 8, 1919. Decided March 8, 1919.)

[179 Pac. 457.]

*Licenses—Trading Stamps—Penal Statutes—Construction.*

Trading Stamp Act—Stamps Redeemable in Cash—Not Included in Act.

1. *Held*, that Chapter 17, Laws of 1917, regulating the giving of stamps, coupons, etc., by merchants with articles of merchandise sold by them, and providing a penalty for a violation of the Act, does not prohibit the use of trading stamps which are redeemable in cash only.

Penal Statutes—Strict Construction.

2. A penal statute cannot be extended by implication beyond the legitimate import of the words used therein, so as to embrace cases or acts not clearly described by them.

[Constitutionality of statute prohibiting "trading stamps," see notes in *Ann. Cas.* 1915A, 375; *Ann. Cas.* 1916A, 212.]

*Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.*

PROSECUTION by the State against Lutey Bros., a corporation, for a misdemeanor committed in the violation of the Trading Stamp Act. From a judgment of conviction, defendant appeals. Reversed.

*Messrs. Galen, Mettler & Toomey and Messrs. Walker & Walker*, for Appellant, submitted a brief; *Mr. Frank W.*

*Mettler, Mr. Thomas J. Walker and Mr. Frank J. Wolcott*, of the Bar of New York, of Counsel, argued the cause orally.

If the facts as shown by the agreed statement do not bring the transaction in question within the wording of this statute as written, then the conviction of appellant must be reversed. It must be within the letter of the law, and the law must be strictly construed, since it is penal in its nature. The rule that that is included which is within the spirit as well as the letter of the law has no application to the statute under consideration. (*United States v. Wiltberger*, 5 Wheat. (U. S.) 76, 5 L. Ed. 37.) Giving the law that strict construction which its penal character demands, and construing it as a whole, it seems clear that it requires a license only in connection with what is commonly known as premium advertising, in which the gifts or bonuses are in the form of merchandise, and does not refer to transactions such as shown by the agreed statement of facts in this case.

The right of companies to furnish, and of tens of thousands of merchants now using, to continue to use, this co-operative discount system, as well as the rights of tens of millions of the consuming public to receive a discount on their small as well as large cash purchases afforded them through the medium of trading stamps, redeemable in cash or merchandise of their selection at their option, have been expressly upheld by the courts of last resort of many states, which courts, after setting forth in detail the facts relative to the furnishing and use of such a system, have held the same beneficial to all concerned and lawful, and Acts intended to hamper or prohibit such use violative of the natural rights of all parties concerned, which are guaranteed and protected by the provisions of their respective state Constitutions, among others the following: *Ex parte Drexel*, 147 Cal. 763, 3 Ann. Cas. 878, 2 L. R. A. (n. s.) 588, 82 Pac. 429; *Winston v. Beeson*, 135 N. C. 271, 65 L. R. A. 167, 47 S. E. 457; *In re Opinion of the Justices*, 226 Mass. 613, 115 N. E. 978; *State v. Caspare*, 115 Md. 7, 80 Atl. 606; *State v. Sperry & Hutchinson Co.*, 110 Minn. 378, 126 N. W. 120; *Young*

v. *Commonwealth*, 101 Va. 853, 45 S. E. 327; *State v. Ramseyer*, 73 N. H. 31, 6 Ann. Cas. 445, 58 Atl. 958; *Denver v. Frueauff*, 39 Colo. 20, 12 Ann. Cas. 521, 7 L. R. A. (n. s.) 1131, 88 Pac. 389; *State v. Sperry & Hutchinson Co.*, 94 Neb. 785, 49 L. R. A. (n. s.) 1123, 144 N. W. 795; *State v. Dalton*, 22 R. I. 77, 84 Am. St. Rep. 818, 48 L. R. A. 775, 46 Atl. 234; *State v. Shugart*, 138 Ala. 86, 100 Am. St. Rep. 17, 35 South. 28; *Montgomery v. Kelly*, 142 Ala. 552, 110 Am. St. Rep. 43, 70 L. R. A. 209, 38 South. 67; *People v. Zimmerman*, 102 App. Div. 103, 92 N. Y. Supp. 497. To these decisions might be added the decisions of many inferior state courts, as well as the decisions of many federal courts, having this discount system under consideration. We will cite and quote from only two of them, however. In *Ex parte Hutchinson*, 137 Fed. 949, the district judge in the course of his opinion says: "The giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and it is not obnoxious to public policy." In *Sperry & H. Co. v. Temple*, 137 Fed. 992, the United States circuit court, district of Massachusetts, says: "The trading stamp business is essentially legitimate, and, so far as the court can discover, it is the only way in which the small purchaser practically obtains a discount for immediate payment."

Mr. S. C. Ford, Attorney General, Mr. Frank Woody, Assistant Attorney General, Mr. Joseph R. Jackson, Mr. A. C. McDaniel, Mr. Frank L. Riley and Mr. N. A. Rotering, for Respondent, submitted a brief; Mr. Jackson and Mr. Rotering argued the cause orally.

According to the agreed statement of facts, the appellant herein did use and furnish as a gift and bonus to its customers the Sperry & Hutchinson green trading stamps with and for the sale of goods, wares and merchandise. The said stamps entitled the said purchaser receiving the same with his mer-

chandise to procure from The Sperry & Hutchinson Company the sum of one mill for every ten cents paid to the appellant for the said merchandise, as something free and above the article purchased by the buyer. The article given, to-wit, the stamp, is of value, and, being of value, even though the redemption of it is in actual cash, nevertheless, comes within the term of "bonus" or "premium," since under the act governing the use of the trading stamps the words "gift, premium or bonus" are given the widest and most general scope.

A reading of the statute discloses that the stamps, coupons, etc., are not to be used as "a gift or bonus or otherwise," showing thereby that a stamp given by the merchant with merchandise to be rebated by a third person is one of the things that cannot be used, unless the merchant has obtained a license and has paid for such license to the proper authorities the stipulated sum as fixed by law. (*State ex rel. Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54, 57.) The stamp need not be one which shall entitle the purchaser receiving the same to procure a premium or bonus in the form of goods, wares or merchandise, for the statute speaks of "any premium or bonus." The statute thus enlarges the scope or meaning ordinarily given to the word "premium" and to the word "bonus," by making it include goods, ware and merchandise. The words "free of charge for less than the retail market price thereof" clearly have reference to the words "goods, wares or merchandise," as indicated by the absence of any punctuation in the phrase.

Construing the law as strictly as the statute is capable of construction, respondent contends that the use of the stamps in this case is certainly within the terms of "gift" or "bonus"; and even should it be contended that this position of respondent is not correct, then do we insist that the intent of the legislature surely brings the use and furnishing of the said stamps within the purview of the word "otherwise," as used in Chapter 17.



There is nothing in the statute that would exclude "cash" from the definition of "bonus" or "premium." Everything that is without charge is included. There is no express or implied intention of the legislature to restrict in any way the meaning of the words.

Similar legislation has been enacted in many of the states and there are many constructions by the courts upon this class of legislation. Many of the state courts persistently declared invalid similar Acts until the supreme court of the United States, in three opinions, held as unsound the reasons upon which these Acts were declared invalid. Since the decisions of the supreme court of the United States many of the state courts have changed their attitude, and courts, before which the question was a new one, proceeded to decide in conformity with the United States supreme court opinions. (See *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, Ann. Cas. 1917B, 455, L. R. A. 1917A, 421, 60 L. Ed. 679, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. Ed. 691, 36 Sup. Ct. Rep. 379; *Pitney v. Washington*, 240 U. S. 387, 60 L. Ed. 703, 36 Sup. Ct. Rep. 385; *District of Columbia v. Kraft*, 35 App. Cas. (D. C.) 253, 30 L. R. A. (n. s.) 957, 962; *State v. Pitney*, 79 Wash. 608, Ann. Cas. 1916A, 209, 140 Pac. 918; *Sperry & Hutchinson Co. v. Melton*, 69 W. Va. 124, 34 L. R. A. (n. s.) 433, 71 S. E. 19; *State v. Underwood*, 139 La. 288, 71 South. 513; *State v. Wilson*, 101 Kan. 789, 168 Pac. 679; *State ex rel. Sperry & Hutchinson Co. v. Weigle*, 166 Wis. 613, 166 N. W. 54; *Sperry & Hutchinson Co. v. Blue*, 202 Fed. 82, 120 C. C. A. 854.)

MR. JUSTICE COOPER delivered the opinion of the court.

This is an appeal from a judgment of conviction in a criminal prosecution originally brought in a justice's court of Silver Bow County, for a violation of Chapter 17, Laws of 1917, commonly known as the Trading Stamp Law, the title and section 1 of which read as follows:

“An Act to regulate the giving or furnishing of Bonuses or Premiums, such as the giving or furnishing of Stamps, Coupons, Tickets, Certificates, Cards, Gifts or Premiums, such as Crockery, Chinaware, Aluminumware, Tinware or anything else that may be included with or contained in Packages of any kind of Merchandise, of any description, or other similar Device for, or with or in connection with the Sale of Goods, Wares or Merchandise, and providing a Penalty for the violation thereof.

“Section 1. Every person, firm or corporation who shall use, and every person, firm or corporation who shall furnish to any other person, firm or corporation to use, as a gift or bonus, or otherwise, in, with, or for the sale of any goods, wares or merchandise, any premium or bonus, including stamps, coupons, tickets, certificates, cards, or other similar devices which shall entitle the purchaser receiving the same with such sale of goods, wares or merchandise to procure from any person, firm or corporation, any premium or bonus, including goods, wares or merchandise free of charge or for less than the retail market price thereof upon the production of any number of said stamps, coupons, tickets, certificates, cards or other similar device; and every person, firm or corporation placing premiums or bonuses or goods, wares or merchandise, including such as crockery, chinaware, aluminumware, tinware, graniteware, or anything else that may be included (in) or contained or delivered with packages of any kind of merchandise of any description, shall, before so furnishing, selling or using the same, obtain a separate license therefor from the county treasurer of each county wherein such furnishing or selling or using of such premiums or bonuses shall take place, for each and every store or place of business in that county from which such furnishing or selling of premiums or bonuses as herein enumerated, or in which such shall take place.”

Section 2 imposes an annual license fee of \$6,000 for permission to do what section 1 prohibits merchants from doing without such license.

Section 4 declares that any person, firm or corporation violating any of the provisions of the Act, is guilty of a misdemeanor, punishable by fine or imprisonment in the county jail, or by both such fine and imprisonment.

The trial in the justice's court resulted in a verdict of guilty and the imposition of a fine. The defendant appealed to the district court where, after the overruling of a demurrer to the complaint upon the ground, among others, that the facts stated did not constitute a public offense, a trial *de novo* was had upon an agreed statement of facts. Conviction again followed. Defendant appeals from the judgment of conviction.

The complaint charges that the defendant "did willfully, [1] unlawfully, wrongfully and intentionally use, as a gift and bonus, in and with and for the sale of certain goods, wares and merchandise, \* \* \* a premium, to-wit, stamps, commonly known as, called and designated Sperry-Hutchinson Trading Stamps, which stamps then and there entitled the purchaser receiving the same with such sale of goods, wares and merchandise to procure from the Sperry-Hutchinson Company,— \* \* \* a premium and bonus free of charge, to-wit, the sum of one mill, lawful money of the United States of America, \* \* \* without \* \* \* having obtained a separate license therefor," *etc.*

The agreed statement shows substantially these facts: The defendant Lutley Bros. is a corporation doing a mercantile business in the city of Butte in nine different stores. The Sperry-Hutchinson Company, a New Jersey corporation engaged in furnishing to retail merchants "trading stamps" under a contract the preamble of which recites the scheme to be "a co-operative system of giving a cash discount on small as well as large cash purchases, for the purpose of encouraging cash trade," *etc.*, entered into a contract with Lutley Bros. to furnish to it the system and services relating thereto. The stamps were furnished to and used by the defendant, the method of their issue and use being briefly the following: The customer who made a purchase at any one of the Lutley stores, was, upon

payment in cash, furnished one trading stamp for each ten cents paid by him, which the purchaser in turn was required to paste in so-called stamp-books, each with a capacity for 1,000 stamps. These stamp-books, when filled with 1,000 of the trading stamps, representing purchases amounting in all to \$100, the Sperry-Hutchinson Company redeemed at its place of business in Butte, for \$2 in cash. On the back of each stamp appeared the following:

"Subject to the notice in our Green Stamp Books, this stamp will be redeemed by us in cash. It is our property and not transferable except as stated in such notice.

"THE SPERRY & HUTCHINSON Co."

On each of the stamp-books is found this legend: "Redeemable only in cash."

On the part of the respondent, we are asked to affirm the judgment assessing a fine of \$25 against the defendant, and to require it to pay an annual license fee of \$6,000 under the statute, before it can use trading stamps in its business as evidence of a cash discount. On the part of the appellant, we are regaled with a mountain of legal argument and judicial opinion, by which (as was remarked by the Chief Justice on the oral argument) "the court is blinded by the blaze of light," in which the constitutionality of the Act is assailed, upon the ground that it aims at the deprivation of that freedom of contract and choice of lawful occupation protected by constitutional guaranties.

The fundamental policy of the Act is to regulate the giving of premiums or bonuses. The language employed in section 1, however, is so worded and contains so many meaningless words and phrases that it all but defies analysis. Its title is open to even more severe criticism in that respect. From a consideration of both the title and the body of the Act, it may be said that the statute is aimed at three distinct classes and may be paraphrased somewhat as follows: 1. Every person, firm or corporation who shall use trading stamps which entitle the person receiving the same to exchange the stamps for goods,

wares and merchandise, must, before using such stamps, obtain a license, *etc.* 2. Every person, firm or corporation who shall furnish to another person, firm or corporation for use, the stamps mentioned above, must also first obtain the license. 3. Every person, firm or corporation placing in or delivering with a package of goods sold, any premium such as crockery, chinaware, aluminumware, *etc.*, must likewise first obtain the license. In other words, it seems to be aimed against the use of goods as a premium. It does not appear to deny to a merchant the right to sell goods for cash at a discount from the general market price, nor to prohibit the use of trading stamps redeemable only in cash. As thus construed, the statute has no application to the case presented by this record, and in the use of the stamps in question, defendant did not violate any of the laws of this state.

An offense is not punishable unless it falls within the condemnation of some penal statute. If it is not plainly and specifically within the Act, it is not against law, and no conviction can be had thereunder. Its provisions are not to be [2] extended by implication, and the act charged as an offense must be unmistakably within the letter as well as the spirit of the law. (*State v. Tuffs*, 54 Mont. 20, 26, 165 Pac. 1107.) "The rule is founded upon the principle that the power of punishment vests in the legislature, not in the courts." (*State v. Aetna Banking & Trust Co.*, 34 Mont. 379, 87 Pac. 268.) Penal statutes are not to be extended by implication beyond the legitimate import of the words used in them, so as to embrace cases or acts not clearly described by such words. (26 Am. & Eng. Ency. of Law, 657; *State v. Aetna Banking & Trust Co.*, *supra*.)

Webster defines a premium to be, "A price for a loan, a sum in addition to interest; a bonus." Bonus: "An allowance in addition to what is usual, current or stipulated, as a bonus on stocks." See, also, The Century Dictionary and Cyclopedia, under the definitions of the words "bonus" and "premium." That the impositions of the Act are drastic and so highly penal

as to be exclusive—and intended to be so—is conceded. The question then is:

Does the furnishing of trading stamps, redeemable in cash, as shown in the case before us, constitute the giving of a premium or bonus as variously described therein? The transaction involves no element of chance, uncertainty or contingency. In fact, it amounts to a specific deduction for a cash purchase, regardless of amount—a percentage discount—a rebate, and does not therefore fall within the condemnation of the statute. "When the purchaser and the seller understand that the token, coupon or stamp issued with the sale of goods is of a stated cash value, the transaction thereby becomes purged of its objectionable features and influences which such legislation condemns." (*Trading Stamp Cases*, 166 Wis. 614, Ann. Cas. 1918D, 707, 166 N. W. 59.) We are fortified in this interpretation of the Act by the reasoning of the courts in numerous cases. (*Olson v. Ross* (N. D.), 167 N. W. 385; *Rast v. Van Deman & Lewis Co.*, 240 U. S. 342, Ann. Cas. 1917B, 455, L. R. A. 1917A, 421, 60 L. Ed. 679, 36 Sup. Ct. Rep. 370; *Tanner v. Little*, 240 U. S. 369, 60 L. Ed. 691, 36 Sup. Ct. Rep. 379; *State v. Weigle* (Wis.), 168 N. W. 385; *Trading Stamp Cases*, *supra*.)

From the views expressed, it becomes apparent that the questions respecting the application of constitutional guaranties are merely hypothetical; and we decline to anticipate a proposition so momentous until a case is presented in which the precise facts are involved.

The complaint does not state a public offense and the court erred in overruling the general demurrer interposed by defendant. The judgment is reversed and the cause is remanded, with directions to the district court to dismiss the proceeding.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

STATE, RESPONDENT, v. SPERRY-HUTCHINSON CO.,  
APPELLANT.

(No. 4,332.)

(Submitted January 8, 1919. Decided March 8, 1919.)

[179 Pac. 460.]

(For syllabus, see *State v. Lutey Bros.*, ante, p. 545.)

*Appeal from District Court, Silver Bow County;*

PROSECUTION by the State against the Sperry & Hutchinson Company, a corporation, for a violation of the Trading Stamp Act. From a judgment of conviction, defendant appeals. Reversed.

Cause submitted on briefs filed and oral argument made by Counsel in *State v. Lutey Bros.*, ante, p. 545.

MR. JUSTICE COOPER delivered the opinion of the court.

Defendant corporation was found guilty of a misdemeanor by the district court of Silver Bow county for the violation of the provisions of the so-called Trading Stamp Law (Chap. 17, Laws of 1917) and sentenced to pay a fine of \$25. It appealed from the judgment.

The cause was tried on an agreed statement of facts substantially the same as that found in the opinion in the case of *State v. Lutey Bros.*, ante, p. 545, 179 Pac. 457. Upon the authority of that case, the judgment herein is reversed and the cause remanded, with directions to the district court to dismiss the complaint.

*Reversed and remanded.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE HOLLOWAY concur.

## LUTEY BROS., RESPONDENTS, v. JACKSON ET AL., APPELLANTS.

(No. 4,323.)

(Submitted January 8, 1919. Decided March 8, 1919.)

[179 Pac. 459.]

*District Courts—Departments—Injunction—Prosecution of Action—Jurisdiction.***District Courts—Injunction Against Prosecution of Action.**

1. Injunction does not lie to prevent the prosecution of an action at law, jurisdiction over the subject matter of which has been acquired by another court, unless necessary to prevent a multiplicity of suits, or unless there is some equitable circumstance in the case of which a party cannot avail himself at law.

[As to injunction against prosecution of action in another state, see notes in 56 *Am. Rep.* 663; 59 *Am. St. Rep.* 880.]

**Same—Departments—Injunction Against Prosecution of Action.**

2. Where a writ of attachment had issued in one department of the district court in a cause pending therein, another department of the same court was without jurisdiction to enjoin, at the instance of defendant, further action in the attachment proceeding, his remedy lying in application to the first department for appropriate relief.

*Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge.*

ACTION by Lutey Bros., a corporation, against Joseph R. Jackson, as county attorney of Silver Bow County, and certain other county officers, for an injunction to restrain defendants from further proceeding in a cause pending in another department of the same court. Injunction granted. Defendants appeal from an order denying a motion to dissolve it. Reversed.

*Mr. S. C. Ford*, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, *Mr. Joseph R. Jackson*, *Mr. A. C. McDaniel*, *Mr. Frank L. Riley* and *Mr. N. A. Rotering*, for Appellants, submitted a brief; *Mr. Jackson* and *Mr. Rotering* argued the cause orally.

*Messrs. Galen & Mettler*, *Messrs. Walker & Walker* and *Mr. C. S. Wagner*, for Respondent, submitted a brief; *Mr. Wagner* argued the cause orally.



MR. JUSTICE COOPER delivered the opinion of the court.

On October 28, 1918, some three months after the defendant in the action of the *State of Montana v. Lutley Bros.* (the plaintiff herein), *ante*, p. 545, 179 Pac. 457, had been adjudged guilty of a violation of Chapter 17, Laws of 1917, known as the Trading Stamp Law, and fined \$25, the judgment in which was this day reversed and the cause remanded with directions to dismiss the complaint for failure to state a public offense, action at law numbered A10532 was commenced in Department No. 1 of the district court of Silver Bow county presided over by Judge Lynch, by the county treasurer in the name of the state against Lutley Brothers, for the purpose of collecting the license fee prescribed by the Act, as well as damages. The complaint comprised seventeen causes of action, the prayer in each of which was for judgment for \$6,000 as license due and unpaid, and \$15 as damages, making a total of \$102,000 license and \$255 damages. On the same day, a writ of attachment issued directing the sheriff to attach practically all of the property of the defendant, of every kind and description. On the 29th of the same month and before the writ of attachment had been levied, the plaintiff herein, Lutley Brothers, brought this action numbered A10541, in Department No. 2, Judge Lamb presiding, against the county attorney, the county treasurer and the sheriff of Silver Bow county, to restrain them from proceeding further with the prosecution of cause numbered A10532, or the writ of attachment issued thereunder. On the same day Judge Lamb granted the injunction prayed for. On October 30, the defendants herein filed their motion to dissolve the injunction. After a hearing, the court below modified the injunction to the extent of permitting prosecution of the action brought to collect the license fee (Cause No. A10532), but denied the motion to dissolve the injunction. From the order so made, the defendants appealed.

The question with which we are confronted is: Did the court (acting through Judge Lamb of Department No. 2 thereof) have jurisdiction to enjoin the defendants from prosecuting

the action entitled "*The State of Montana v. Lutey Bros.*" No. A10532, or from seizing upon attachment the property of the plaintiff in the case at bar?

As will be observed, case No. A10532 was already pending in the same court, but in a department presided over by a judge other than the judge who granted the injunction complained of. [1] It is a principle so long established in judicial annals that it is now crystallized into statute law, that a court of equity will not enjoin the prosecution of an action at law where another court has already acquired jurisdiction of the subject matter thereof, unless such restraint is necessary to prevent a multiplicity of such proceedings; or unless there is some equitable circumstance in the case of which a party cannot avail himself at law. (Chap. 28, Laws 1913; *Beck v. Fransham*, 21 Mont. 117, 53 Pac. 96; *Spratt v. Helena Power Transmission Co.*, 37 Mont. 60, 92, 94 Pac. 631; *Rickett v. Johnson*, 8 Cal. 34; *Anihony v. Dunlap*, 8 Cal. 26; 22 Cyc. 811.)

When the district courts became clothed with authority to [2] grant both legal and equitable relief in the same action, the necessity of seeking relief elsewhere, and thus arraying one court against another, no longer existed. Judge Lynch having acquired jurisdiction of the cause in the first instance, application for appropriate relief, either legal or equitable, should have been made to him. (*State ex rel. Carroll v. District Court*, 50 Mont. 428, 147 Pac. 612; *State ex rel. Little v. District Court*, 49 Mont. 158, 141 Pac. 151; *State ex rel. Nissler v. Donlan*, 32 Mont. 256, 80 Pac. 244.) In the case of *State ex rel. Little v. District Court*, *supra*, Mr. Justice Holloway, speaking for this court, said: "Upon the presentation of the indictment there was pending in the district court of the first judicial district, in and for Lewis and Clark county, a cause entitled '*The State of Montana v. Howard Little.*' There is but one such court, and that it had jurisdiction to hear and determine all questions arising in the *Little Case* cannot be gainsaid."

As was said by Chief Justice Brantly in *State ex rel. Nissler v. Donlan*, *supra*: "While the judges exercising their duties in

their respective departments must, for some purposes, be regarded as presiding over different courts, yet the court is in fact one court, and has jurisdiction of all matters which may properly be brought before it." In *State ex rel. Carroll v. District Court*, 50 Mont. 428, 430, 147 Pac. 612, Mr. Justice Holloway again observed: "The two departments of the district court are co-ordinate. Neither possesses any appellate or supervisory control over the other, and when one has spoken upon a matter properly before it, a due sense of propriety alone ought to be sufficient to stay interference by the other."

It must, therefore, be constantly borne in mind that while there may be more than one department constituting a district court in this state, it is still but one court—one judicial establishment; and that the action of one of the judges in a matter rightfully pending before him, is the action of the district court in that behalf. The authority of Judge Lynch in the attachment proceeding before him continued until the matter could be finally and completely disposed of, and was absolute. While the observance of this principle might be required on grounds of judicial comity and courtesy, it is a rule essential to the dignity and just authority of every court, and its proper observance is necessary in order that unseemly and discreditable conflicts may be avoided.

The order is reversed with directions to district court to dismiss the proceeding.

*Reversed.*

MR. CHIEF JUSTICE BRANTLY: I concur in the result reached.

MR. JUSTICE HOLLOWAY concurs.

STATE EX REL. PRATO ET AL., RELATORS, v. DISTRICT COURT ET AL., RESPONDENTS.

(No. 4,372.)

(Submitted March 1, 1919. Decided March 15, 1919.)

[179 Pac. 497.]

*Intoxicating Liquors—Seizure—Condemnation—Court Procedure—Jurisdiction—Appeal—Certiorari.*

**Intoxicating Liquors—Seizure—Destruction—District Courts—Jurisdiction.**

1. By sections 7 and 8 of Chapter 143, Laws of 1917, jurisdiction is conferred upon the district court to entertain and determine the proceeding provided for in the Act incident to the seizure, forfeiture, sale or destruction of contraband liquors.

**Same—Seizure—Destruction—District Courts—Nature of Proceeding.**

2. The proceeding above, though properly prosecuted in the name of the state, is not criminal in character, but must be regarded as one *in rem* against the liquors and other articles seized, instituted for their condemnation as forfeited property, the complaint being in the nature of a libel.

**Same.**

3. Where, after seizure of contraband liquors, the owner appears and makes claim to them, a trial must be had in the district court of the questions of title and whether or not the liquors were being kept or used by the claimant with the intention of violating the prohibition law.

**Same—Final Judgment—Appeal.**

4. The trial of the questions of ownership and the purpose for which seized liquors were being kept by the claimant, is one *inter partes*, and results in a final judgment affecting the rights of the state and the claimant, from which, under section 7098, Revised Codes, either party may appeal.

**Same—District Court—Appeal—Certiorari.**

5. Since *certiorari* does not lie where the complaining party has an appeal from a final judgment which may be entered in the action or proceeding, *held* that the writ does not run to annul an order of the district court overruling a demurrer to a complaint filed under Chapter 143, Laws 1917, charging defendants with keeping liquors unlawfully, and an order denying them a trial by jury, their remedy being by appeal from the final judgment.

[As to questions reviewable on *certiorari*, see note in 40 Am. St. Rep. 29.]

**Same—Certiorari—When Writ Does not Lie.**

6. Erroneous rulings of the district court in first determining the sufficiency of the complaint and thereafter passing upon the question of defendants' right to a jury trial made during the course of the proceeding referred to above, did not deprive it of jurisdiction, so as to render them reviewable on writ of *certiorari*.

Original application by the State, on the relation of Jim Prato and Anton Giacomo, for *certiorari* to the District Court

of Silver Bow County, and J. J. Lynch, a judge thereof, to annul certain orders made in a proceeding brought under Chapter 143, Laws of 1917. Proceeding dismissed.

*Messrs. Walker & Walker* and *Mr. C. S. Wagner*, for Relators, submitted a brief; *Mr. Wagner* argued the cause orally.

*Mr. S. C. Ford*, Attorney General, *Mr. Frank Woody*, Assistant Attorney General, and *Mr. Jos. R. Jackson*, *Mr. N. A. Robering*; *Mr. Frank L. Riley* and *Mr. A. C. McDaniel* for Respondents, submitted a brief; *Mr. Woody* and *Mr. McDaniel* argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

On February 5 of this year, one Frank L. Riley filed a complaint in the district court of Silver Bow county charging that he had probable cause to believe, and did believe, that on January 30 intoxicating liquors had been and still were kept and deposited by Jim Prato and Anton Giacomo in a building situate on the north side of Daly Street, known as and called The American House, in the city of Walkerville, Silver Bow county, and that such intoxicating liquors had been and then were intended by the defendants to be sold, exchanged, given away, bartered or otherwise disposed of in violation of the laws of the state of Montana. Thereupon there was issued by the court a search-warrant directed to any peace officer of Silver Bow county, and commanding him, together with the necessary and proper assistants, to thoroughly search the premises described in the complaint, and, if any intoxicating liquors were found therein, to seize the same together with the vessels containing them, and all implements, furniture, fixtures and other articles used in connection therewith, and to keep them safely and securely until final action thereon. The officer was also directed to serve the warrant and return the same to the court with his return indorsed thereon. On February 7 return was made by John F. Melia, a peace officer of Silver Bow county,

showing that he had found and taken into his possession a large quantity of intoxicating liquors and had them in his possession. On the same day the court made and entered an order fixing February 19 at 10 o'clock A. M. as the time for hearing upon the return to determine whether the liquors, *etc.*, were being used or in any manner kept or possessed by any person with the intention of violating the laws of Montana relating to intoxicating liquors, when and where any person claiming any interest in them or in any part thereof, might appear and show cause, if any he had, why the same should not be adjudged forfeited according to law. On February 19, C. S. Wagner, Esq., appeared for the defendants and filed a demurrer to the complaint, the grounds of which were that the court had no jurisdiction of the persons of the defendants or of the subject of the action, that the complaint did not state facts sufficient to constitute a cause of action, and that the complaint did not state facts sufficient to constitute a public offense. The demurrer was overruled. Mr. Wagner thereupon filed a verified answer for the defendants which put in issue all the allegations of the complaint and alleged affirmatively that at all the times mentioned in the complaint, the defendants were the lawful owners and holders of the liquors, and that such liquors were wrongfully and unlawfully seized and removed from the premises of the defendants; that the defendants for a long time prior to December 31, 1918, had been duly and regularly licensed to carry on the business of retail liquor dealers at the place known as and called The American House described in the complaint, and until that date had lawfully carried on therein the business of retail liquor dealers; that they had lawfully purchased the liquors so seized, for the purpose of selling and disposing of them in the ordinary course of business; that these liquors consisted of and constituted the unsold portion of their stock in trade, all of which had theretofore been lawfully purchased and acquired as aforesaid; that on the thirty-first day of December, 1918, they dismantled their place of business and had removed therefrom all intoxicating liquors therein contained, and de-

posited the same in a cellar or vault upon the said premises in the rear of their place of business and securely locked the approaches to the same, so that they were securely kept from thence until the time they were seized; that the defendants each for himself averred that he had not sold, exchanged, given away, bartered or disposed of any of the liquors or compounds thereof capable of being used as a beverage, in the state of Montana or elsewhere; that he had not in any other respect violated the laws relating to the sale of intoxicating liquors; that defendants at all times since December 31 were lawfully occupying the premises described in the complaint, and that they had not jointly or severally or otherwise made, sold, exchanged, given away, bartered or otherwise disposed of any portion of said liquors contrary to law, and that no part thereof so seized had ever been used in any manner, or kept or possessed by the defendants, or any other person or persons or at all, with the intention of violating any of the provisions of the laws of Montana. At the same time the defendants made written demand for a jury trial. This demand was by the court denied. Thereupon the hearing upon the return was set for March 1.

On February 21 an application was made to this court for a writ of *certiorari* to annul the order of the court overruling the demurrer and also the order denying the defendants' motion for a trial by jury. At the hearing the attorney general in response to the writ, presented a certified copy of the proceedings and filed a motion to quash the writ and dismiss the proceeding on the grounds that the district court had jurisdiction to make the orders, and that relators have a plain, speedy and adequate remedy by appeal. The motion must be sustained.

The proceeding was instituted under the provisions of Chap-  
[1] ter 143, Laws of 1917 (Laws 1917, p. 239) commonly known as the Enforcement Act. Section 7 of that Act authorizes any district court on application by sworn complaint by any person, from which it appears that there is probable cause to believe that intoxicating liquor is being sold, exchanged,

given away, bartered or otherwise disposed of, or kept contrary to law, to issue a warrant directed to any peace officer of the county ordering him to search the premises described in the complaint, and to seize all intoxicating liquors there found, together with the vessels in which they are contained, and all implements, furniture, fixtures and other articles used or kept for the sale, barter, giving away or otherwise disposing of such liquors, and to safely keep the same and make return thereof within three days showing all acts and things done by him, with a particular statement of all liquors, *etc.*, and other articles seized, and the name of the person or persons in whose possession the same were found. The person or persons found in possession of such liquors must be served with a copy of the warrant.

Section 8 provides that when the warrant is returned the court shall fix a time, not less than ten nor more than twenty days thereafter, for the hearing upon the return. The court is authorized to hear and determine whether or not the liquors or other articles so seized, or any part thereof, were used or in any manner kept or possessed by any person with the intention of violating any of the provisions of the law relating to intoxicating liquors. At the hearing any person claiming an interest in the property seized may appear and be heard upon filing a verified claim setting forth in particular the character and extent of his interest. The sworn complaint upon which the search-warrant was issued, and the possession of such intoxicating liquor and other articles shall be *prima facie* evidence of the contraband character of said liquor, other articles, *etc.* The burden rests upon the claimant to show his interest and also that the liquors were not being kept with intent to violate any provision of law relating to intoxicating liquors. If upon the hearing the evidence warrants, or if no person shall appear as claimant, the court shall thereupon enter a judgment of forfeiture and order the liquors and other articles destroyed forthwith by the officers having custody of the same at the time of the adjudication; provided, however, the court may, in its dis-



cretion, appoint a special officer for the purpose of executing the judgment of forfeiture by destroying such liquors and property; and provided further, that if in the opinion of the court any of such forfeited property, other than intoxicating liquors, is adapted to any lawful use, such judge shall, as a part of the order and judgment, direct that such property, other than intoxicating liquors, be sold as upon execution by the officer having them in custody, and that the proceeds of such sale, after the payment of all costs of the proceeding, be paid into the common school fund of the school district in which the property was seized. A forfeiture, destruction or sale of any property under this section shall not be a bar to a prosecution under any other provision of law relating to intoxicating liquors.

It is apparent from the foregoing recital of the substance of the provisions of sections 7 and 8, that jurisdiction is conferred upon any district court to entertain and determine the proceedings therein provided for and that it terminates in a final judgment. The proceeding has some of the aspects of a criminal action. It is not such, however, for, though properly prosecuted in the name of the state, the complaint charges no one with an offense. It is rather to be regarded as a proceeding *in rem* against the liquors, *etc.*, for their condemnation as forfeited property, and the complaint is in the nature of a libel. (23 Cyc. 299; *State v. Burrow's Liquors*, 37 Conn. 425; 2 Black on Judgments, sec. 799.) This is made apparent by the last sentence in section 8, for it declares that the forfeiture or destruction or sale of any property under the judgment, shall not be a bar to a prosecution under any other law relating to intoxicating liquors.

The requirement in section 7 that a copy of the warrant must [3] be served upon the person or persons found in possession of the liquors seized, and the provision in section 8 permitting any person interested to appear and claim the liquors, *etc.*, contemplate that when anyone does appear and make claim, a trial must be had of the question of title and whether or not the liquors were being kept or used by the claimant with the

[4] intention of violating the laws prohibiting the sale of intoxicating liquors. Such a trial is, for this purpose, a trial *inter partes* and necessarily results in a judgment affecting the rights of the state and the claimant from which either may appeal, under section 7098 of the Revised Codes.

Under section 7203, *certiorari* may issue when the inferior [5] tribunal, board or officer exercising judicial functions, has exceeded its or his jurisdiction and there is no appeal, nor any plain, speedy and adequate remedy. The fact that the complaining party has an appeal from the final judgment, precludes relief by this court by *certiorari*. (*State ex rel. Whiteside v. First Judicial District Court*, 24 Mont. 539, 63 Pac. 395; *State ex rel. Weinstein Co. v. District Court*, 28 Mont. 445, 72 Pac. 867; *State ex rel. Davis v. District Court*, 29 Mont. 153, 74 Pac. 200; *State ex rel. Furnish v. Mullendore*, 53 Mont. 109, 161 Pac. 949.)

Furthermore, it was within the jurisdiction of the district [6] court to determine the sufficiency of the complaint and also to determine whether the defendants were entitled to a trial by jury. We do not concede that the court was in error in making either order. But conceding, for the purpose of this case only, that both of them were erroneous, the error did not divest it of jurisdiction in the sense that the proceeding became *coram non judice*; otherwise every erroneous decision during the course of any proceeding would divest the court of jurisdiction. (Cases cited *supra*.)

The writ is set aside and the proceeding dismissed.

*Dismissed.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

## ROY, APPELLANT, v. KING'S ESTATE ET AL., RESPONDENTS.

(No. 3,966.)

(Submitted March 18, 1919. Decided March 31, 1919.)

[179 Pac. 821.]

*Executors and Administrators—Estates of Deceased Persons—  
Actions Against—Declarations and Admissions—Evidence—  
Admissibility—Discretion—Accounts Stated.*

**Pleading and Practice—Admissions—Nonsuit—When Improper.**

1. The admission in defendant administrator's answer that part of plaintiff's claim against decedent's estate was justly due and had been allowed by him, entitled plaintiff to judgment in that amount at least, in his action against the estate, and a nonsuit was therefore improper.

**Evidence—Deceased Persons—Declarations and Admissions—Admissibility.**

2. Though evidence of declarations or admissions of a deceased person against his interest is not the most satisfactory kind of evidence, it is by section 7870, Revised Codes, made competent, and must be considered as any other fact by court or jury, the statements of the witness deposing to either, however, to be accepted with caution.

**Executors and Administrators—Actions Against—Declarations and Admissions—Admissibility.**

3. Where, in an action against an estate to recover for goods, wares and merchandise furnished to and services performed for decedent in his lifetime, a declaration or admission,—definitely identified by the witness deposing to it,—acknowledging the debt, was deliberately and understandingly made, it is evidence sufficient to make out a *prima facie* case.

**Same—Deceased Persons—Declarations and Admissions—Weight of Evidence.**

4. Where evidence of declarations or admissions by a decedent against his interest is aided by the testimony of witnesses who know of the dealings between plaintiff and decedent and testify from such knowledge as to articles furnished to and services performed for the latter, it is entitled to added weight.

**Same—Accounts Stated—What Constitutes.**

5. The approval of an account against an estate by the decedent in his lifetime after examination of it and his expressed intention to pay it constituted it an account stated, and proof of the separate items thereof was not necessary to entitle plaintiff to recover.

[As to definition and elements of account stated, see note in 62 Am. Dec. 85.]

**Accounts Stated—Evidence—Action on Open Account.**

6. Evidence showing an account stated is sufficient to support a cause of action on an open account.

**Executors and Administrators—Actions Against—Deceased Persons—Declarations and Admissions—Admissibility—Discretion.**

7. *Held*, that the provision of section 7891, Revised Codes, as amended (Laws 1913, p. 57), declaring plaintiff in an action against an executor or administrator an incompetent witness, unless it ap-

appears to the court that without his testimony, injustice will be done, lodges determination of the question of the admissibility of plaintiff's testimony, within the sound discretion of the court, and that refusal of permission to testify was not an abuse of such discretion where there was sufficient evidence to make out a *prima facie* case without plaintiff's testimony.

**Value—Opinion Evidence—Admissibility.**

8. A farmer who was acquainted with the market value of farm products, during the year they were furnished by his wife to defendant administrator's intestate was qualified to answer the question whether the amounts charged for the various items in the account sued upon were fair and reasonable.

*Appeal from District Court, Sheridan County; Frank N. Utter, Judge.*

**ACTION** by Nellie Roy against the Estate of Mamie King, deceased, and W. A. Wheeler, administrator. Judgment dismissing the action. Plaintiff appeals. Reversed and remanded.

*Mr. C. E. Comer*, for Appellant, submitted a brief, and argued the cause orally.

The declaration of a decedent is always admissible in evidence against his pecuniary interest. This is not only the law of the state of Montana, it seems to be the law everywhere. (Sec. 7870, Rev. Codes; *Stoddard v. Newhall*, 1 Cal. App. 111, 112, 81 Pac. 666; 9 Am. & Eng. Ency. of Law, 2d ed., 8; *Wright v. Stage*, 83 Kan. 445, 111 Pac. 467; *Wormouth v. Johnson*, 58 Cal. 621; *Harp v. Harp*, 136 Cal. 421, 69 Pac. 28, 29; *State v. Alcorn*, 7 Idaho, 599, 97 Am. St. Rep. 252, 64 Pac. 1014, 1015; *Harrisburg Bank v. Tyler*, 3 Watts & S. (Pa.) 373; *Fellows v. Smith*, 130 Mass. 378; 2 Jones on Evidence, sec. 242.)

Evidence of a stated account is sufficient proof of plaintiff's cause of action on an open account. (1 Cyc. 485; *Rice v. Schloss*, 90 Ala. 416, 7 South. 802; *Mitchell v. Joyce*, 69 Iowa, 121, 28 N. W. 473.) "An account may be proved by proving the admissions of the defendant relative to that specific account." (1 Encyclopedia of Evidence, 157.)

*Mr. D. E. McLaughlin* and *Messrs. McLaughlin & Brown*, for Respondents, submitted a brief.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

This is an action against the defendant as administrator upon the estate of Mamie King, deceased, to recover the sum of \$366.49, with interest thereon from September 1, 1913, alleged in the complaint to be due the plaintiff as the reasonable value of goods, wares and merchandise sold and delivered to deceased in her lifetime, of board and lodging furnished, and of services performed—all sold and delivered, furnished and performed, on account, at the request of deceased between July 1, 1910, and September 1, 1913. The defendant denied generally all the allegations of the complaint, except that he admitted that there was due plaintiff \$100 on the account which had been allowed her upon her presentation of it to him as a claim against the estate of deceased. When the plaintiff had concluded the introduction of her evidence, the court on motion of defendant granted a nonsuit, on the ground that the plaintiff's evidence was not sufficient to make out a *prima facie* case. From the judgment dismissing the action plaintiff has appealed. Several contentions are made by counsel, the principal one of which is that the court erred in granting the nonsuit. This contention must be sustained.

The admission in the answer that plaintiff's claim to the [1] amount of \$100 had been allowed by defendant as justly due her from the estate, entitled her to a judgment for this amount, without regard to the value of the evidence as to the balance. Furthermore, we think the evidence sufficient to show *prima facie* plaintiff's right to recover the whole amount demanded.

Prior to the month of May, 1910, and thereafter until about July 1, 1914, the deceased maintained her residence on a homestead claim near Froid, in Sheridan county. Plaintiff's home was about a fourth of a mile away. The deceased being in ill health and also in straitened financial circumstances, had plaintiff do laundering and housework for her from time to time as she needed it. She also obtained from plaintiff butter,

cream, eggs, bread, vegetables and table board. At her request, plaintiff charged for her services as they were rendered and for the various articles as they were furnished, entering the items upon an account-book kept by her for that purpose. This course of dealing continued until deceased discontinued her residence on her homestead.

The court held that the plaintiff was incompetent to testify, but the witness Mrs. Peel, plaintiff's daughter, who taught school in the neighborhood, knew the deceased well. After stating generally that she knew the course of dealing between her mother and deceased was as above stated, and that she had personal knowledge of the work done at different times and of the furnishing of many of the articles charged as items in the account, she testified in substance that between May, 1910, and July 1, 1914, she had several conversations with the deceased with reference to the condition of the account and the amount due plaintiff at the times of the particular conversations, ascertaining the amount from plaintiff's book at the request of deceased and showing her the account. At these times deceased declared that she was satisfied with the amount then due and was pleased to know that it was not greater. The last conversation had with the deceased was a short time before her death. At that time the deceased was going away, having completed the time of residence on her homestead necessary to enable her to obtain a patent. She then declared to the witness that she had been living "at the mercy" of the plaintiff and intended to pay her and, besides, give her a present, because she thought that the plaintiff deserved more than the amount of the bill. This she said to the witness after she had looked over the account-book with the witness at plaintiff's home who summed the amount then due. The amount of the account then shown by the book was the same as the amount for which the action was brought. Deceased did not return to her homestead, and soon thereafter died.

The witness Lizzie Marquis, who resided in the neighborhood, had knowledge in a general way of the course of dealings be-

tween the plaintiff and deceased. She stated in substance that she often met deceased, both at the home of deceased and that of plaintiff; that deceased often spoke of her obligation to the plaintiff in that she could not hold her claim but for plaintiff's assistance; that she (deceased) was then "living on the promises she was making"; that she was worried about the amount she owed plaintiff; and that she would not be able to pay plaintiff unless she could "prove up" on her claim so that she could secure a loan on it. The witness stated further that deceased did not mention any specific sum she owed plaintiff, but that in response to the inquiry how much she owed plaintiff, she said, "I owe her quite a chunk." There was other evidence to the effect that the charges made for the particular items of services rendered and supplies furnished were reasonable.

John W. Roy, plaintiff's husband, testified that while he could not identify any particular item charged in the account, because he could not give his attention to the dealings between plaintiff and deceased, he knew that the plaintiff did housework for the deceased at different times during the three years following May, 1910; that she furnished the deceased with bread, eggs, butter and vegetables; that she did laundering for deceased and that during the last year of the stay of deceased on her homestead she was furnished table board by the plaintiff.

In granting the nonsuit, the court apparently proceeded [2] upon the theory that while it was competent to introduce evidence of the declarations of deceased against her interest, this alone was not sufficient to make out a *prima facie* case in the absence of direct proof of performance of each item of work done and the furnishing of each article of supplies, supplemented by proof of the reasonable value of each. This theory was clearly erroneous. It is true, evidence of such declarations or admissions of a deceased person is not the most satisfactory kind of evidence, because it is open to the objections that it is easily fabricated, that it is impossible to contradict it by the testimony of the deceased, that the testimony of the witness may be colored by his passion or prejudice, that, because

of his defective memory, he does not recollect the language used, and that he may have misunderstood the statement testified to as importing a meaning which the declarant did not intend; but, since the evidence is made competent by the statute (Rev. Codes, sec. 7870) if, in the light of all the circumstances, the court or jury, as the case may be, believe that the particular declaration or admission was made as stated by the witness, it must be considered as any other fact in the case. The theory of the rule allowing the evidence, is that the regard which men have for their own interests is a sufficient guaranty that any such declaration or admission is true, and hence, though the evidence is hearsay, the declaration or admission being established, the truth of it need not be supported by oath. Of course, the testimony of the witness asserting the making of the declaration or admission, must be accepted with caution for the reasons above stated (sec. 8028, Rev. Codes); but, when it appears that the [3] declaration or admission was deliberately and understandingly made and it is definitely identified by the witness deposing to it, it is evidence sufficient to make out a *prima facie* case. (1 Greenleaf on Evidence, Lewis' ed., sec. 200; *Chicago & N. W. Ry. Co. v. Button*, 68 Ill. 409; *Mauro v. Platt*, 62 Ill. 450; *Schell* [4] *v. Weaver*, 128 Ill. App. 106.) It would seem that added weight should be given to such evidence when it is aided by the testimony of witnesses who have knowledge of the dealing between the plaintiff and deceased and testify from such knowledge as to the performance of some of the services rendered and some of the articles furnished.

To warrant a recovery, however, it was not incumbent upon [5] the plaintiff to introduce evidence to prove the separate items of the account. The approval of it by the deceased after examination of it and her expressed intention to pay it, constituted it an account stated (*Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427), and proof establishing the account stated, was *prima facie* sufficient to warrant a recovery though the complaint declared upon an open account. The statements of the deceased dispensed with the necessity of proving the correct-



ness of the different items. Evidence showing an account [6] stated is sufficient to support a cause of action on an open account. (1 Cyc. 485, and cases cited in note.)

At the opening of the trial, plaintiff was sworn as a witness and testified generally to the arrangement between her and the [7] deceased under which she performed the services and furnished the supplies. Pending her examination, upon objection interposed by counsel for defendant on the ground that she was not a competent witness, the court struck out the testimony already given and refused to permit her to testify further. Error is assigned on this ruling. Section 7891 of the Revised Codes, as amended by Chapter 41 of the Laws of 1913 (Laws 1913, p. 57), declares: "The following persons cannot be witnesses: \* \* \* 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person, as to the facts of direct transactions or oral communications between the proposed witness and the deceased, excepting when the executor or administrator first introduces evidence thereof, or when it appears to the court that without the testimony of the witness, injustice will be done." The evident purpose of this provision was to declare the plaintiff in the action an incompetent witness, unless the defendant waives the incompetency, which he may do, as provided in the first exception, or unless, under the second exception, it appears to the court that if the witness is not allowed to testify, recovery cannot be had upon a cause of action which is obviously meritorious. It thus becomes apparent that it is lodged in the sound discretion of the court to determine in each case, as it develops during the trial, whether the testimony is necessary to enable the plaintiff to make out a *prima facie* case, and thus prevent an injustice. From this point of view, the court did not abuse its discretion in pursuing the course it did; for there was sufficient evidence to make out a *prima facie* case, without plaintiff's testimony.

The witness Roy testified that he was a farmer; that he was [8] acquainted with the market value of potatoes, cream, eggs, butter, etc., during the year 1910, and subsequent to that time; that he had bought and sold such articles; that he had produced them upon his farm; and that he had examined the account. He was then asked to state whether the amounts charged in the account for the various items were fair and reasonable. To this inquiry he answered, "Yes." Upon motion of counsel for defendant all of his testimony on this subject was stricken out on the ground that he had not shown himself sufficiently qualified to express an opinion. This was error. The witness showed himself amply qualified to answer the question. But in view of what has been said and upon the record before us, we think it was error without prejudice.

Other similar rulings were made by the court. It will not be necessary, however, to give him special notice.

The judgment is reversed and the cause remanded for a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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JOHNSTON, RESPONDENT, v. CITY OF HARDIN ET AL.,  
APPELLANTS.

(No. 4,219.)

(Submitted March 17, 1919. Decided March 31, 1919.)

[179 Pac. 824.]

*Cities and Towns—Special Improvement Districts—Creation—  
Lack of Jurisdiction—Misleading Notice of Intention—  
Description of Boundaries—Presumptions.*

Cities and Towns—Special Improvement Districts—Creation—Prerequisites.

1. The successive steps necessary to be taken by a city council in the creation of a special improvement district under Chapter 89, Laws

of 1913, as amended by Chapter 142, Laws of 1915, are: (1) The adoption of a resolution of intention; (2) the service of the required notice; (3) a hearing and determination against protests; and (4) the passage of a resolution creating the district, the first three of which are jurisdictional, and failure of the council to take any one of these is fatal to the proceedings.

**Same—City Council—Powers—Presumptions.**

2. The city council in proceedings looking to the creation of special improvement districts has only such powers as are conferred upon it by Chapter 89, Laws of 1913, and Chapter 142, Laws of 1915, above, in that behalf, and therefore no presumption in favor of its jurisdiction can be indulged.

**Same—Special Improvements—Notice of Intention.**

3. Unless waived, service of the notice of the city council's intention to create a special improvement district upon the interested property owner, provided for by section 3 of Chapter 89, Laws of 1913, is indispensable to the validity of the proceedings.

**Same—Notice of Intention—Improvement District—Description of Boundaries.**

4. The notice mentioned above (paragraph 3) must refer the interested property owner to the particular resolution of intention to create a proposed district for a description of its boundaries, the resolution thus in effect being made a part of the notice.

**Same—Erroneous Description of Boundaries—Effect on Jurisdiction of Council.**

5. Where a resolution of intention to create a special improvement district described the boundaries of an entirely different district from that referred to in the notice served upon the owner of property affected, the city council did not acquire jurisdiction to proceed with the improvement.

**Same—Notice—Caption not Part of.**

6. The caption of a notice is no part of the notice itself, and cannot be looked to to supply any deficiency in the notice.

**Same—Erroneous Notice—Actual Knowledge—Inferences Insufficient.**

7. In the absence of the statutory notice of the city council's intention to create a special improvement district, plaintiff property owner was not called upon to act, an inference deducible from his complaint that he had actual knowledge that his property was to be included in the proposed district, being insufficient.

*Appeal from District Court of Bighorn County; A. C. Spencer, Judge.*

ACTION by J. W. Johnston against the City of Hardin, A. L. Mitchell, Mayor, and others, to restrain defendants from proceeding with certain public improvements. Judgment for plaintiff. Defendants appeal from the judgment and from an order refusing to dissolve a temporary injunction. Affirmed.

*Messrs. Gillette & Burke* and *Messrs. Peters & Smith*, for Appellants, submitted a brief; *Mr. C. F. Gillette* argued the cause orally.

The objection that the contract delegates powers to the engineer which may not be delegated has to do with a provision of the contract which applies only to minor alterations and additions, which the city has authority to make. (*Mansur v. City of Polson*, 45 Mont. 585, 125 Pac. 1002.) Minor details of such work may be committed by the council to the discretion of appropriate officers and employees. (4 *McQuillin on Municipal Corporations*, 3913, 4137, 4167, 4168.)

The fact that the contract price may exceed the estimate does not deprive the council of jurisdiction to make the improvement. In states where the law requires that the contract price must not exceed the estimated cost of a special improvement, or in states where the only opportunity given taxpayers to contest the assessment is at the preliminary hearing and then on the basis of the estimate, it is held that the contract price may not go beyond the estimate. But this is not so here. And where this is not so by statute, the fact that the cost of the work exceeds the preliminary estimate is not fatal to the assessment. Hence it is not fatal to jurisdiction. (5 *McQuillin on Municipal Corporations*, 446; *Auditor General v. Chase*, 132 Mich. 630, 94 N. W. 178; *State v. Town of Guttenberg*, 38 N. J. L. 419; *Matter of Wendover Avenue (Re Board of Street Opening, etc.)*, 65 Hun, 625, 20 N. Y. Supp. 563; *Didsworth v. Cincinnati*, 18 Ohio C. C. 288, 10 Ohio C. D. 177; *McChesney v. City of Chicago*, 188 Ill. 423, 58 N. E. 982; *Davies v. City of Los Angeles*, 86 Cal. 37, 47, 24 Pac. 771.) By our statute, the cost of the improvement and not the estimate is the basis of the assessment. (See, also, *Branting v. Salt Lake City*, 47 Utah, 296, 153 Pac. 995; *Hill v. Swingley*, 159 Mo. 45, 60 S. W. 114.)

Even in those states where the right to contract is limited to the amount of the estimate, the courts hold that the failure of the city to make a correct estimate of the cost of the work

is but a defect or irregularity in the proceedings and does not rob the council of jurisdiction to make improvements. (*City of Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768; *City of North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.)

The objections that the engineer may increase or diminish the cost of the work, that concrete gutters, for which no estimate was made, may be built, that the contract is indefinite and uncertain in not fixing a definite sum for the work, and that the cost will be greatly in excess of the estimate, all amount merely to apprehensions of future injury. If at any time during the course of the construction any of these things should be attempted, if unauthorized, injunctive relief could then be obtained which would adequately protect plaintiff in his rights, or he could restrain the city from collecting the assessments levied after the work had been completed. (High on Injunctions, 1st ed., sec. 390; 4 R. C. L. 5354; *Healy v. Smith*, 14 Wyo. 263, 116 Am. St. Rep. 1004, 83 Pac. 583; *Crescent Mining Co. v. Silver King Min. Co.*, 17 Utah, 444, 70 Am. St. Rep. 810, 54 Pac. 244.)

The principal work to be done under the contract was paving. The drainage and grading was largely incidental to that work, as it may be. (5 McQuillin on Municipal Corporations, 4352-4354; *Kramer v. City of Los Angeles*, 147 Cal. 668, 82 Pac. 334; *Harter v. Barkley*, 158 Cal. 742, 112 Pac. 556.)

Proceedings such as those here involved, even though jurisdictional, will not be invalidated by mere clerical errors where no harm is suffered. (*North Yakima v. Scudder*, 41 Wash. 15, 82 Pac. 1022.) "Due process of law implies notice and opportunity to be heard." (Dillon on Municipal Corporations, 5th ed. 1365.) "Therefore, if plaintiff had notice of the improvement although said notice may have been defective, errors were waived, for he did not appear before the council nor did he file any objection to the proposed assessment as required by law." (*Owens v. Marion*, 127 Iowa, 469, 103 N. W. 381; *Everington v. Board of Park Commissioners*, 119 Minn. 334, 138 N. W. 426.)

*Messrs. Collins, Campbell & Wood*, for Respondent, submitted a brief; *Mr. Donald Campbell* argued the cause orally.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

On June 25, 1917, the city council of the city of Hardin adopted a resolution declaring its intention to create District No. 9 for the purpose of grading, paving and otherwise improving certain streets, the cost of the improvements to be charged against the property within the district. The notice published by the clerk and the copy mailed to property owners referred to resolution of intention No. 95, on file in the city clerk's office, for a description of the boundaries of the proposed district. At the same time a resolution of intention to create District No. 10 for a like purpose was adopted, and in this instance the published notice and the copy mailed to property owners referred to resolution of intention No. 93 for the description of the boundaries of this proposed district. Plaintiff received a copy of each of these notices but did not appear before the council or protest against the creation of either district. Later, the council by resolution undertook to create each district and to contract with Hanlon & Okes to do the work. Plaintiff, the owner of real property within each of the districts, instituted this action to restrain the city authorities and the contractors from proceeding and secured a temporary injunction. The defendants appeared by general demurrer and motion to dissolve the injunction and, when this demurrer was overruled, they declined to plead further and suffered judgment to be entered against them and appealed. They also appealed from an order refusing to dissolve the injunction.

It is alleged in the complaint, and admitted by defendants for the purposes of these appeals, that resolution of intention No. 95 bears no relationship whatever to District No. 9, but describes the boundaries of, and has to do with, an entirely different district, and that resolution of intention No. 93 does

not relate to District No. 10 but describes altogether different territory.

The proceedings of the city council were governed by Chapter [1] 89, Laws of 1913, as amended by Chapter 142, Laws of 1915. Under the provisions of these statutes the successive steps necessary to be taken in creating a special improvement district are: (1) The adoption of a resolution of intention. (2) The service of the required notice. (3) A hearing and a determination against the protestants if any protest is made. (4) The passage of a resolution creating the district. The first three steps are jurisdictional, and the failure of the council to take any one of them is fatal to the proceedings. (*Shapard v. City of Missoula*, 49 Mont. 269, 141 Pac. 544.)

Section 3 of Chapter 89 above as amended provides that upon the passage of the resolution of intention the council must give notice by publication and by mailing a copy of the published notice to every property owner within the proposed district. The section then continues: "Such notice must describe the general character of the improvement or improvements so proposed to be made, and state the estimated cost thereof, and designate the time when and the place where the council will hear and pass upon all protests that may be made against the making of such improvements, or the creation of such district; and said notice shall refer to the resolution on file in the office of the city clerk for the description of the boundaries."

These proceedings have for their ultimate purpose the subjection of the property within the district to taxation to bear the cost of the improvements. They are *in invitum*, and in recognition of these facts the legislature has provided a complete but direct plan of procedure designed to protect property from confiscation and at the same time permit beneficial improvements to be made. It has provided for notice to the property holder and an opportunity for him to be heard before [2] the proposed district is created, and it has constituted the city council a special tribunal to conduct the hearing. This tribunal is clothed with limited powers only and no presump-

tion in favor of its jurisdiction will be indulged. The statute measures its authority and compliance with the terms of the statute is a condition precedent to its right to act. (*State ex rel. Quintin v. Edwards*, 40 Mont. 287, 20 Ann. Cas. 239, 106 Pac. 695.)

The notice is the process by which the council brings the [3] interested property owner before it, and service of the process is indispensable unless service is waived. (*Davidson v. Clark*, 7 Mont. 100, 14 Pac. 663.) Service is made by publishing a notice containing the matters enumerated in section 3 above, and by mailing to every property owner affected, a copy of the notice as published. The purpose of serving the notice is (1) to apprise the property owner that his property is within the proposed district and liable to assessment if the district is finally created; (2) to inform him of the general character of the contemplated improvements and the probable cost of the same, and (3) to advise him of the time when and [4] place where he may be heard. While it is not required that the notice itself shall contain a description of the boundaries of the proposed district, it must refer to the particular resolution of intention for such a description and the resolution of intention must describe the boundaries, and by this reference the designated resolution is made a part of the notice to all [5] intents and purposes. If, then, the resolution to which the property owner is referred, does not describe the boundaries of the proposed district but describes other territory altogether, the primary purpose of the notice is defeated, or, in other words, the notice contemplated by the statute is not given and the council does not acquire jurisdiction to proceed. The authorities elsewhere are quite uniform in holding that statutes of this character are mandatory. (4 Dillon on Municipal Corporations, 5th ed., sec. 1457; 2 Page & Jones on Taxation by Assessment, sec. 740; 4 McQuillin on Municipal Corporations, sec. 1849.)

It is established by this record that the resolution to which plaintiff and other property owners were referred for a descrip-



tion of the boundaries of District No. 9 describes territory none of which is within that district, and the same thing is true with respect to District No. 10. It is suggested by counsel for [6] appellants that the caption of each notice as published contains a correct reference to the appropriate resolution by number; but it is sufficient answer to say that the caption is no part of the notice.

It is also argued that it is fairly inferable from the complaint [7] that plaintiff had actual knowledge that his property was to be included in these proposed districts; but if we assume that this deduction is warranted, it does not aid appellants. Plaintiff was not called upon to act until he had been served with the statutory notice in the manner provided by law.

The statutes above not only qualify and limit the powers which the city council may exercise, but they define with particularity the mode in which the restricted authority may be used, and compliance with their provisions is the *sine qua non* to the creation of a special improvement district for making improvements the expense of which is to be a charge against the property included. (*Shapard v. City of Missoula*, above; *Cooper v. City of Bozeman*, 54 Mont. 277, 169 Pac. 801.) The statutes define the contents of the notice and the manner of service, and declare that the giving of this notice is one of the steps necessary to be taken before the city council is clothed with jurisdiction to order the work done, and no argument, however specious, can excuse a failure to observe their mandates.

Since the council did not acquire jurisdiction to create either of these districts, the other questions argued need not be considered.

The judgment and order are affirmed.

*'Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER  
concur.

## LISH, RESPONDENT, v. MARTIN ET AL., APPELLANTS.

(No. 3,978.)

(Submitted March 19, 1919. Decided April 4, 1919.)

[179 Pac. 826.]

*Promissory Notes—Oral Modification—Evidence—New Trial—  
Notice—Presumptions—Verdicts—Striking from Files—  
Power of District Courts.***New Trial—Formal Notice not Required.**

1. A formal notice for a new trial is not required under the Montana new trial procedure, the notice of intention performing the function of such notice.

**Same—Notice of Intention—Record on Appeal—Presumptions.**

2. In the absence of a showing of lack of notice in the appellants of the hearing of a motion for a new trial granted respondent, it will be presumed that the proceedings were regular and that they had notice.

**Same—Failure to Give Notice—Review of Error—Duty of Appellant.**

3. Where a motion for a new trial is heard and granted without notice to the adverse party, it is incumbent upon him to move the trial court to vacate the order as improvidently made, supporting the motion by affidavit showing that notice of the hearing was not given.

**Promissory Notes—Oral Modification—Evidence.**

4. An unexecuted oral agreement the effect of which was to alter the terms of a promissory note by extending the time of payment and changing the amount due, constituted no defense, under section 5067, Revised Codes, to the enforcement of the note; hence evidence tending to prove the agreement was improperly admitted.

[As to validity and enforceability of parol extension of time for payment of note, see note in *Ann. Cas.* 1914A, 103.]

**Verdicts—Rendition and Entry—Striking from Files—Power of District Court.**

5. After a verdict, which was neither informal nor insufficient (Rev. Codes, sec. 6756), had been received and recorded, the trial court had no power to order it stricken from the files and direct the jury to return another, its authority over it being limited to setting it aside upon proper motion for a new trial.

**Promissory Notes—Counterclaim—Unjustifiable Verdict.**

6. Where the amount due plaintiff on a promissory note admittedly exceeded defendant's counterclaim by \$102.50, a verdict in favor of defendant was unwarranted.

*Appeal from District Court, Fergus County; Roy E. Ayers, Judge.*

**ACTION** by Otis S. Lish against W. F. Martin and others. Judgment for defendants. From an order granting plaintiff a new trial, they appeal. **Affirmed.**

Cause submitted on briefs of Counsel.

*Mr. Ralph J. Anderson and Messrs. McConochie & Williams,*  
for Appellants.

*Mr. Wm. M. Blackford and Mr. J. C. Huntoon,* of Counsel,  
for Respondent.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

Plaintiff brought this action to recover the balance upon a promissory note for \$440 dated August 28, 1912, and due January 1, 1914, upon which a payment of \$65.50 had been made. The answer of the defendants admits the execution and delivery of the note, the payment pleaded, and sets forth a counterclaim and attempts to plead an affirmative defense in bar. There was a reply to the new matter and the trial which followed resulted in a judgment for defendants for \$294 and costs. Upon motion of plaintiff, the court granted a new trial, and defendants appealed from the order.

1. After the entry of judgment, and within the time allowed by law, plaintiff filed his notice of intention to move for a new [1] trial, specifying all the statutory grounds. He did not make any formal motion for a new trial and because of this fact appellants contend that the court erred in making the order.

Our new trial procedure is statutory (*Ogle v. Potter*, 24 Mont. 501, 62 Pac. 920), and our statute does not require that a formal motion for new trial be made. The notice of intention performs the function of such a motion. (*Wastl v. Montana Union Ry. Co.*, 13 Mont. 500, 34 Pac. 844; *Needham v. Salt Lake City*, 7 Utah, 319, 26 Pac. 920; *East v. Mooney*, 7 Utah, 414, 27 Pac. 4; *Storer v. Heitfeld*, 17 Idaho, 113, 105 Pac. 15.)

2. Complaint is made that the court heard and determined [2] the motion without notice to defendants. The record recites that "the motion having been regularly set, came on for

hearing this day, Messrs. Blackford & Huntoon appearing for plaintiff and the defendants not appearing. The plaintiff's motion was by the court sustained and a new trial granted."

While defendants were entitled to notice and an opportunity to be heard (sec. 7149, Rev. Codes), there is not anything in the recital above to indicate that they were not notified of the hearing, and since the court is one of general jurisdiction, the regularity of its proceedings will be presumed in the absence of a showing to the contrary. (*Sanden v. Northern Pac. Ry. Co.*, 39 Mont. 209, 102 Pac. 145.)

If the motion was heard and granted without notice to defendants, it was incumbent upon them to make that fact appear, and proper practice required them to move the court to have the order vacated as improvidently made, supporting their motion by affidavits showing that in fact notice of the hearing was not given. (*Whitney v. Superior Court*, 147 Cal. 536, 82 Pac. 37; 1 Hayne on New Trial & Appeal, sec. 164; 2 Spelling on New Trial & Appellate Practice, sec. 379.) Since the record does not disclose lack of notice, the error, if error was committed, is not subject to review upon this appeal.

3. As an affirmative defense in the nature of a plea in bar, [4] defendants allege that on February 18, 1914, plaintiff agreed orally to employ defendants to perform certain work of the value of \$60; to credit this amount on the indebtedness represented by the note; to accept a new note for \$376 due September 15, 1914, and to cancel and surrender the note herein sued upon; that before defendants could perform the work or tender the renewal note, plaintiff, in violation of the agreement, commenced this action, and that defendants are ready, able and willing to perform the agreement in all things by them to be performed. A general demurrer was interposed to this so-called defense, but the record fails to show that it was ever passed upon. At the trial, over plaintiff's objection, the court admitted evidence tending to prove the agreement, and instructed the jurors that if they found that the agreement was made as alleged and was supported by a sufficient consid-

eration, the verdict should be for the defendants. In both instances the court erred.

The note sued upon constituted a contract in writing between the parties, and the effect of the agreement pleaded was to alter it by extending the time of payment and changing the amount due. Section 5067, Revised Codes, provides: "A contract in writing may be altered by a contract in writing or by an executed oral agreement, and not otherwise." Since the contract pleaded rested in parol and was entirely unexecuted, it was impotent for the purpose intended and constituted no defense. (*Kinsman v. Stanhope*, 50 Mont. 41, L. R. A. 1916C, 443, 144 Pac. 1083.)

4. The jury first returned a general verdict in favor of the [5] defendants for \$294, and this verdict was received and filed. The court then ordered it stricken from the record and orally instructed the jury to return a verdict in favor of the plaintiff for the amount found due upon the note less any amount found due defendants upon their counterclaim, and at the same time submitted to the jury a form of special verdict. Acting under this direction, the jury returned a general verdict in favor of plaintiff for \$179.85 and found specially "that there was a renewal of the note mentioned in this case." After this second general verdict had been received and recorded, the court ordered it stricken from the files and the original verdict reinstated, and upon that verdict and the special finding judgment was rendered.

Section 6756, Revised Codes, provides: "When the verdict is announced if it is informal or insufficient in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out." The first verdict was not informal and it covered the issues submitted by the court. When it was received and recorded it passed beyond the control of the jury and beyond the control of the court, except that upon proper motion for a new trial it might be set aside, but not otherwise. (*Harrington v. Butte, A. & Pac. Ry. Co.*, 36 Mont. 478, 93 Pac. 640.) The subsequent

proceedings by which the second general verdict and the special finding were returned, were altogether void.

There is no possible theory upon which the verdict in favor [6] of the defendants can be justified. The items of the counterclaim amount to only \$297.50, whereas the amount admitted to be due upon the note exceeded \$400, and therefore plaintiff was entitled to recover the difference at least, according to defendants' own theory. (*Murray v. Haldorn*, 54 Mont. 125, 168 Pac. 38.) The trial court extricated itself by granting a new trial, and it could not have done otherwise.

We need not refer to the conflicting evidence with respect to the items constituting defendants' counterclaim.

It was unnecessary for plaintiff to appeal to the court's discretion, for he was entitled to a new trial as a matter of right.

The order is affirmed.

*Affirmed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER  
concur.

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GLENDENNING ET AL., RESPONDENTS, v. SLAYTON ET AL.,  
APPELLANTS.

(No. 3,976.)

(Submitted March 19, 1919. Decided April 14, 1919.)

[179 Pac. 817.]

*Trusts—Escrows—Deposits—Banks—Breach of Trust—Actions  
—Conversion—Assumpsit — Payment — Receipts—Wrongful  
Delivery—Effect.*

Appeal and Error—Pleadings—Sufficiency—New Trial Order—Review.

1. The sufficiency of a complaint not drawn in question in any way during trial could not be considered by the district court on the hearing of the motion for a new trial, and may not be passed upon by the supreme court on appeal from the order denying it; its sufficiency being reviewable only on appeal from the judgment.

"Escrow"—Definition.

2. An "escrow" is a written instrument delivered to a third person to take effect upon the happening of a contingency and delivery of it to the person entitled to it.

[As to deeds delivered in escrow, see note in 53 Am. St. Rep. 555.]

Same—What not Susceptible of Being Placed in Escrow.

3. Under the above definition, neither money nor a receipted bill, deposited in bank under an agreement between parties to a proposed lease of coal land, could properly become the subject of an escrow, neither being a written contract.

Trusts—Breach—Actions—Conversion—*Assumpsit*.

4. A bank which accepts a deposit of money in trust for the benefit of another, to be delivered to a third party upon the happening of a contingency, is bound to the highest good faith in executing the trust thus created; disposition of the deposit contrary to instructions renders the bank liable in damages either for a conversion, or in *assumpsit* for money had and received.

Same—Banks—Breach of Trust—Evidence—Insufficiency.

5. Evidence, in an action in *assumpsit* against a bank to recover a deposit of money, accepted by it in trust to be delivered to one of the parties to an assignment of a lease, upon the happening of a certain contingency, held insufficient, in the circumstances attending the transaction, to warrant a finding that in applying the money deposited to the discharge of debt due it from the assignor, it had violated the trust.

Payment—Receipts—Wrongful Delivery—Effect.

6. A receipted bill deposited with a bank to be by it delivered to the debtor upon a showing that certain conditions precedent to the completion of an assignment of a lease had been fulfilled was not effective as evidencing payment *pro tanto* of the debt, if wrongfully delivered before the happening of the contingency, but could be recovered from the debtor upon a showing that delivery thereof was unauthorized.

*Appeal from District Court, Musselshell County; Chas. L. Crum, Judge.*

ACTION by W. H. Glendenning and J. C. Gregg, copartners doing business under the firm name of Glendenning & Gregg, against D. W. Slayton, L. Lehfeldt, Martin Johnson, A. C. Bayers et al., copartners doing business under the firm name and style of Bank of Ryegate. Judgment for plaintiffs. Defendants appeal from an order denying their motion for a new trial. Reversed and remanded for new trial.

*Mr. V. D. Dusenbery and Messrs. Johnston & Coleman, for Appellants, submitted a brief; Mr. H. J. Coleman argued the cause orally.*

The escrow agreement to which plaintiffs testify was for their own benefit and protection, but they themselves saw fit to

waive the terms thereof, according to their own testimony. It is a general rule of law that any act done by a buyer of goods tendered in fulfillment of a contract of sale, which he had no right to do if he were not the owner, constitutes an acceptance of the sale. (1 Beach on Contracts, sec. 107; Clark on Contracts, 2d ed., 466; Friedman on Sales, sec. 197; *Young Bros. Mach. Co. v. Young*, 111 Mich. 118, 69 N. W. 152; *Wolf Co. v. Monarch etc. Co.*, 252 Ill. 491, 50 L. R. A. (n. s.) 808, 96 N. E. 1063.) When the grantees of an escrow receive same before the condition is performed, they are estopped to avoid it or say that no title passed; because, as grantees they had obtained possession of it before the condition had been performed. (*Balue v. Taylor*, 136 Ind. 368, 36 N. E. 269; *Gochbauer v. Union Trust Co.*, 225 Pa. St. 503, 74 Atl. 371; *Oland v. Malson*, 39 Okl. 456, 135 Pac. 1055; *Hodo v. Leeman*, 27 Tex. Civ. 204, 65 S. W. 381.) On December 13, 1910, the plaintiffs received and accepted the assignment and bill of sale. They were thereby vested with all the title of the coal company to the property therein described. Thereafter, they treated and dealt with this property in a manner inconsistent with any other theory than that of ownership thereof.

The only breach which the evidence in the case tends to support is a delivery before a proper bond had been secured by the plaintiffs. The duty to secure the bond was incumbent upon the plaintiffs themselves. It was no part of the defendants' obligation, nor was it the obligation of the coal company. From the only evidence in the case which tends to show why no bond was procured, it appears that it was due to the failure of the plaintiffs to incorporate a company, as required by the bonding company or companies, and as suggested by the register of state lands. Their failure to secure the bond was due to their own negligence. "If the condition is not complied with through the depositor's negligence, he ought not to be heard to complain." (16 Cyc. 577; *Hodo v. Leeman*, 27 Tex. Civ. 204, 65 S. W. 381.)

The understanding and intention of the parties was that the sum of \$804 was to go to the defendant bank to take up the



coal company's obligation with it. That very fact was one of the conditions of the sale. The plaintiffs furnished this payment by executing and delivering to the bank their individual notes. Thus, under plaintiffs' theory, the defendant bank was depositary for itself as beneficiary. "An instrument, complete on its face, and intended to take effect eventually, as a bond or note, cannot be an escrow when deposited with obligee, or with one of several obligees, or with the payee; for such deposit operates immediately as a final delivery and avoidance of the conditions." (16 Cyc. 571, 572; *Dils v. Bank of Pikeville*, 109 Ky. 757, 60 S. W. 715; *Campbell v. Jones*, 52 Ark. 493, 6 L. R. A. 783, 12 S. W. 1016; *Clanin v. Esterly H. Mach. Co.*, 118 Ind. 372, 3 L. R. A. 862, 21 N. E. 35; *Carter v. Moulton*, 51 Kan. 9, 37 Am. St. Rep. 259, 20 L. R. A. 309, 32 Pac. 633; *Wier v. Batdorf*, 24 Neb. 83, 38 N. W. 22; *Larsh v. Boyle*, 36 Colo. 18, 86 Pac. 1000.)

*Messrs. Collins, Campbell & Wood*, for Respondents, submitted a brief; *Mr. Sterling Wood* argued the cause orally.

Appellants could not use the influence which their position gave them to obtain any advantage over respondents (Rev. Codes, sec. 5377), and since they did use and dispose of the trust property for their own benefit and for a purpose unconnected with the trust, they can be held to account to respondents for its proceeds with interest. As said by the supreme court of Oregon in the recent case of *Foulkes v. Sengstacken*, 83 Or. 118, 158 Pac. 952, 163 Pac. 311: "Strictly speaking, the depositary is not the agent of the grantor, nor is he the agent of the grantee, but he is rather the trustee of an express trust." (*Sabin v. Phoenix Stone Co.*, 60 Or. 378, 118 Pac. 494, 119 Pac. 724; *Moore v. Trott*, 156 Cal. 353, 134 Am. St. Rep. 131, 104 Pac. 578; *Seibel v. Higham* (Mo.), 115 S. W. 987.)

Where the holder of an escrow wrongfully delivers the same before the happening of the conditions upon which delivery is to be made, such holder is liable therefor. 10 Ruling Case Law, 634, states the liability of the holder of an escrow as fol-

lows: "As the depositary is bound by the terms of the deposit and charged with the duties voluntarily assumed by him, the rule is that liability attaches to him, if he improperly parts with his deposit." (See, also, 16 Cyc. 576; *Citizens' Nat. Bank v. Davisson*, 229 U. S. 212, Ann. Cas. 1915A, 272, 57 L. Ed. 1153, 1158, 33 Sup. Ct. Rep. 625; *Davisson v. Citizens' Nat. Bank*, 15 N. M. 680, 113 Pac. 598; *Brown v. Citizens' State Bank, Ltd.*, 17 Idaho, 716, 107 Pac. 405.)

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

In this cause plaintiffs recovered a judgment. The defendants have appealed from an order denying their motion for a new trial.

The circumstances out of which the action arose, gathered from the complaint, are, briefly stated, as follows: Prior to December 13, 1910, the Ryegate Coal Mining Company, hereafter referred to as the corporation, held a lease for a term of years from the state of Montana, of certain coal land situate in Meagher, now Musselshell, county. On that date it entered into a contract with the plaintiffs under the terms of which it agreed to assign to them the lease free from all encumbrances held upon the land by the state of Montana, by reason of debts due it from the corporation, and to sell them all personal property used in operating the mine. The price to be paid by the plaintiffs was \$1,000. Of this sum, \$804 was to be paid in cash and the balance, \$196, by a credit to be given the corporation upon an account due from it to the plaintiff Gregg, evidenced by a receipt in the form of a receipted bill. The defendants were associated, with other persons not parties to this action, as copartners in conducting a banking business at Ryegate under the firm name of the Bank of Ryegate. Upon the execution by the corporation of the assignment and bill of sale, it was orally agreed between it and the plaintiffs that the \$804 in cash and the receipted bill should be deposited with the defendants, to be held "as an escrow in trust" for the parties to

be turned over to the corporation whenever it had within a reasonable time paid all the charges due the state and had furnished to the defendants, for the plaintiffs, satisfactory evidence that such charges had been paid and that the title to the leased premises was clear and unencumbered. The deposit was made as agreed, and the Bank of Ryegate accepted the deposit in trust, and as an escrow.

It is alleged that on or about January 13, 1911, the defendants, disregarding the conditions of the trust and without waiting until the corporation had furnished satisfactory evidence that its indebtedness to the state had been paid and a clear title to the premises furnished to the plaintiffs, and without the knowledge and consent of the plaintiffs, wrongfully and unlawfully applied the sum of \$804 on an indebtedness due to the defendants from the corporation; that the defendants did not receive from the corporation an assignment of the lease with satisfactory evidence that the indebtedness had been paid; that the defendants knew that the indebtedness had not been paid; that no assignment of the lease with satisfactory evidence of the discharge of the indebtedness was ever furnished by the corporation to either the plaintiffs or the defendants; that on or about September 1, 1911, the plaintiffs having learned that the defendants had misapplied the sum of \$804 contrary to the terms of the trust, demanded a return thereof together with the receipted bill, but that defendants refused and still refuse, to return the same. It is further alleged that at the time the deposit was made, the corporation was greatly indebted to the state for rents and royalties theretofore accrued, under the lease, but the amount of the indebtedness is not stated. Judgment is demanded for the sum of \$1,000, with interest thereon from September 1, 1911.

In their answer, defendants admit that the plaintiffs purchased from the corporation the lease and all the right, title and interest of the corporation in the land referred to in the complaint. They deny all other material allegations therein contained. As an affirmative defense, they then allege, in sub-

stance, that plaintiffs, with full knowledge of all the facts and circumstances connected with the alleged trust agreement, accepted and received the assignment of the lease from the defendant Martin Johnson and forwarded the same to the register of state lands for the purpose of having it formally approved and accepted, and endeavored to procure a new bond running from the plaintiffs to the state of Montana, as is required by law in the event of an assignment of a lease of state land; that plaintiffs soon thereafter took possession of the leased premises, proceeded to operate the coal mines located thereon and extracted therefrom large quantities of coal; that they also took possession of all the appliances used by the corporation in mining coal, and have ever since kept them and appropriated them to their own use. They further allege that in order to raise the sum of \$804 referred to in the complaint, plaintiffs gave their individual notes, payable to the Bank of Ryegate, plaintiff Gregg giving his note for \$304, due July 1, 1911, and the plaintiff Glendenning giving his note for \$500, due June 1, 1911; that although at the time the plaintiffs were fully advised of all the facts and circumstances concerning the acts of the defendants in connection with the said trust, they voluntarily paid their notes to the defendants; that on or about the ninth day of April, 1912, the plaintiff Glendenning, acting for himself and the plaintiff Gregg, paid to the register of state lands the sum of \$60 to apply upon the rent due under the terms of the lease; that on or about the twenty-third day of April, 1912, the plaintiffs brought an action in the district court of Musselshell county against the corporation and others, seeking to recover from the defendants therein damages for the alleged breach of that clause of the assignment of the lease whereby the corporation had warranted the lease to be clear and free from all encumbrances; that at the time of the happening of these events the plaintiffs were fully advised as to all of them, and that by reason thereof they were estopped to assert that the defendants violated the terms of the alleged trust agreement as set forth in the complaint, and by their conduct ratified the pay-

ment of said money by the defendants. Upon this defense there was issue by reply.

The contentions made in this court are (1) that the complaint does not state a cause of action; (2) that the evidence is insufficient to justify the verdict; (3) that the court erred in refusing to submit to the jury certain instructions requested by the defendants; and (4) that it erred in refusing to grant a new trial on the ground of newly discovered evidence.

The questions presented by the first contention cannot be considered or determined on this appeal. The appeal is from the order denying the defendants a new trial. At no time during the trial was the sufficiency of the pleading drawn in question by objections to the introduction of evidence or other appropriate method. Hence its sufficiency could not be considered by the trial court on a hearing of the motion, nor may it be considered by this court on appeal from the order disposing of it. It could be considered only on appeal from the judgment. (*Campbell v. Great Falls*, 27 Mont. 37, 69 Pac. 114; *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145; *Leggat v. Gerrick*, 35 Mont. 91, 8 L. R. A. (n. s.) 1238, 88 Pac. 788; *O'Rourke v. Grand Opera House Co.*, 47 Mont. 459, 133 Pac. 965.)

It is not clear from the allegations of the complaint whether the theory of counsel in formulating it was that the deposit made with defendants was an escrow, or created a trust to be executed by defendants as trustees for the plaintiffs and the corporation upon the fulfillment by the latter of the conditions [2] upon which it was to be executed. As defined by the common law, an "escrow" is a written instrument delivered to a third person to take effect upon the happening of a contingency (2 Blackstone, 307). It becomes effective only on delivery after the happening of the contingency. This definition of the term is recognized by section 4599 of the Revised Codes. The term originally applied to deeds only, but has now been extended to written instruments generally. (Anderson's [3] Law Dictionary, 413; *Alexander v. Wilkes*, 11 Lea

(Tenn.), 221, 225.) The deposit in question was not an escrow under either the original or the extended application of the term, because neither the money nor the receipted bill had any of the attributes of a written contract,—the receipted bill, the only writing included, being a mere acknowledgment of payment. That it was not an escrow, however, is not important. [4] By accepting it, the defendants became voluntary trustees for the benefit of plaintiffs and the corporation (Rev. Codes, sec. 5371) and thus became bound to the highest good faith in executing the trust (sec. 5374). They could not deal with it for their own benefit or for any other purpose not connected with the trust. (Sec. 5375.) The title to the deposit remained in the plaintiffs until all the attached conditions had been fulfilled, and any disposition of it contrary to the agreement between plaintiffs and the corporation amounted to a conversion of it, rendering the defendants liable. The plaintiffs deeming themselves wronged by the disposition of it by the defendants, were at liberty to bring action against them, either for damages for a conversion, or in *assumpsit* for money had and received. As we read the complaint, counsel elected to sue in *assumpsit* upon the implied promise of defendants to return the deposit to them upon the failure of the corporation within a reasonable time to fulfill the conditions upon which it was made.

The issues of fact presented by the pleadings and submitted to the jury for a solution were: Did the defendants accept the deposit under the agreement alleged in the complaint? Did they make disposition of it in violation of the agreement? If so, did the plaintiffs, after learning of the disposition made of it, ratify the defendants' conduct in disposing of it, and thus preclude a recovery in this action?

Upon the issue whether the trust agreement was made as alleged, the evidence was in hopeless conflict. The jury having resolved this question in favor of the plaintiffs and the trial court having refused a new trial, this court may not revise its action. In our opinion, however, there was no substantial evi-

dence to justify a finding that the defendants violated their duty under the agreement.

The plaintiffs' evidence, which was not aided in any way by [5] that of defendants, tended to show: When the agreement for the assignment and sale by the corporation of its rights under the lease was made, the corporation was indebted to the defendants to the amount of \$804 for borrowed money. It was understood that if there was no encumbrance upon the land growing out of indebtedness due the state, the defendants were to apply the money deposited with them to the payment of this indebtedness and deliver the receipted bill to the corporation as evidence of a *pro tanto* payment of plaintiff Gregg's account. The plaintiffs borrowed the money from the defendants by executing and delivering to them their promissory notes, as alleged in the answer. These notes embodied no condition, nor were they delivered upon any condition. In theory, therefore, the \$804 became a fund in the hands of defendants to serve the purpose of the trust. The assignment with the bill of sale embodied in the same instrument, was executed in duplicate. One copy was delivered to plaintiffs' attorney, and the other left in the possession of plaintiffs and defendant Johnson, who acted for all of the other defendants. The plaintiffs on the same day wrote to the state register of lands at Helena, inclosing the duplicate copy left with them, and requested the register to send them a contract of lease and a bond, the former to be executed by them and the latter by them and some surety company which was authorized to do business in Montana. Defendant Johnson wrote this letter for them at their request. To this letter the register replied on December 22, informing plaintiffs that the state board of land commissioners, having considered their letter of December 13 inclosing the assignment, had instructed him to inform them that their request had been granted, and that all the necessary papers, including a form of bond, for execution would be forwarded as soon as they could be prepared. On December 29 the register wrote to plaintiffs, inclosing a form of bond attached to a copy of a

new lease, for execution, and a copy of an agreement which plaintiffs were required to enter into with the state coal mine inspector, stipulating how the coal thereafter extracted should be weighed in order to determine the amount of royalties which would become due under the lease. In this letter the register inclosed a bill for the fee required for recording the assignment. This bill and the fee for filing the lease the plaintiffs paid on March 27. The arrangement was that the lease and agreement should take the place of the assigned lease. The bond was intended to secure the faithful performance of the covenants of the lease and the agreement with the coal mine inspector. The new lease and bond were exacted under the regulations which had been adopted by the state board of land commissioners, and it was fully understood by the plaintiffs that they must furnish them in order to become substituted in the place of the corporation as lessees. There was correspondence thereafter by the plaintiffs in person and by defendant Johnson in their behalf, touching the ability of plaintiffs to give the required bond. They complained to the register that the surety companies refused to furnish a bond unless they would become incorporated. Finally they were informed by the register that no kind of a bond would be acceptable other than one executed by a surety company. He suggested that the expense of forming a corporation was not great and encouraged them to do this. They did not thereafter furnish the bond and, so far as the evidence discloses, did not make any earnest effort to do so. After the assignment was executed, on December 13, the plaintiffs, not waiting for its approval by the state board of land commissioners, went into the possession of the land and of all of the appliances of the corporation and began to mine and sell coal. They continued their operations until they were notified by the register on March 30, 1911, that they were trespassers and must cease their operations until they furnished the required bond and executed the new lease. They thereupon ceased operations for the time being, but resumed them again and continued them during the following



winter. At the trial they undertook to explain their acts in this behalf by saying that the mine was the only source of supply of coal available to the people of Ryegate, and that they had conducted their operations at the request of the officers of the corporation to meet the necessities of the Ryegate people.

The foregoing brief narrative is gathered from the evidence introduced by the plaintiffs. That introduced by the defendants tended to show that the assignment was an unconditional sale of the rights of the corporation, and that the claim that the defendants were parties to the transaction as fiduciaries, or in any other capacity, was wholly unfounded. A careful scrutiny of the story as told by the plaintiffs, leaves a serious doubt whether it is entitled to any credit. But assuming for present purposes that the agreement was made as they allege, and that defendants agreed to hold the deposit until the corporation furnished satisfactory evidence that the land was free from any encumbrance in favor of the state which would affect the validity of the assignment, we do not think they were entitled to recover. It is true that, from a technical point of view, the officers of the corporation did nothing in the way of furnishing evidence that it was not indebted to the state, nor that the assignment carried all of its rights free from encumbrance. As soon, however, as the plaintiffs were notified by the register of the land office that the assignment had been approved and the new lease and bond were forwarded for execution, no condition being reserved and no mention being made of any indebtedness due from the corporation to the state (there is no evidence in the record whatever that there was any indebtedness), they had in their hands evidence that should have satisfied any reasonable person that they had received all they had bargained for. Defendant Johnson had written the letter of December 13, 1910, for them, at their request. According to Glendenning's testimony, this defendant undertook to aid them in procuring a satisfactory bond. He therefore had knowledge that the purpose of the trust had been fully accomplished and, though he applied the money upon his own knowledge and not

upon evidence furnished by the officers of the corporation, he did the plaintiffs no wrong. True, the plaintiffs both testified without objection that one of the conditions attached to the deposit was that it should not be applied until the plaintiffs had been able to procure a bond. In submitting the case to the jury, however, the court eliminated this evidence from the case by directing the attention of the jury to the agreement alleged in the complaint, and instructing them to find for the defendants unless they were satisfied from all the evidence that an agreement had been made as alleged and had been violated by the defendants. The case as made, therefore, failed to show that the plaintiffs suffered any wrong for which they were entitled to recover. As a whole, it suggests that when the plaintiffs found that they would be compelled to incur the expense of forming a corporation in order to procure a bond, they repented of their bargain and concluded to demand a return of their money, upon the theory that the corporation was at fault in not supplying the evidence which they themselves had procured by having the board of land commissioners approve the assignment. The court should have granted defendants a new trial.

Some evidence was introduced by defendants for the purpose of showing that the plaintiffs by their conduct after they ascertained that the defendants had applied the \$804 to the discharge of the indebtedness due them from the corporation, ratified this disposition of it. We do not think this evidence sufficient to establish a ratification. The conclusion already reached, however, renders reference to it in detail unnecessary.

There is no evidence disclosing what became of the receipted bill. In this connection it may be remarked that under no circumstances were the plaintiffs entitled to recover the amount [6] of it. Even if the defendants wrongfully delivered it to the corporation, it was not effective as a payment *pro tanto* of the indebtedness due plaintiff Gregg. Plaintiffs, if they so desired, could recover from the corporation by showing that the delivery was unauthorized.

In their brief, counsel do not point out wherein the court erred in refusing to submit the requested instructions. Our examination of them does not convince us that it did. In so far as any of them were pertinent to any issue presented by the pleadings, they were fully covered by those submitted.

Since a new trial must be ordered on the ground of insufficiency of the evidence to justify the verdict, it is not necessary to consider the value of the newly discovered evidence.

The order is reversed and the district court is directed to grant the defendants a new trial.

*Reversed and remanded.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.

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WEED, APPELLANT v. WEED, RESPONDENT.

(No. 3,983.)

(Submitted March 20, 1919. Decided April 14, 1919.)

[179 Pac. 827.]

*Divorce—Appeal and Error—Nonappealable Orders.*

**Divorce—Decree—Modification—Nonappealable Order.**

1. An appeal does not lie from an order overruling a motion to strike an affidavit filed in support of a motion for the modification of a decree granting a divorce, such order not being one of the orders made appealable by section 7098, Revised Codes, nor a special order made after final judgment from which an appeal may be taken.

[As to what judgments and orders are subject to appeal, see note in 20 AM. ST. REP. 173.]

**Appeal and Error—Special Order After Final Judgment—Nature of Order.**

2. The special order made after final judgment from which an appeal lies must be one affecting rights incorporated in a judgment previously entered.

*Appeal from District Court, Fergus County, in the Tenth Judicial District; H. H. Ewing, a Judge of the Eighth District, presiding.*

ACTION for divorce, by Howard Tobey Weed against Eva Marie Weed. Decree for plaintiff. He appeals from an order denying his motion to strike defendant's affidavit filed in support of her motion for a modification of the decree. Appeal dismissed.

Cause submitted on brief of Counsel for Appellant.

*Messrs. Belden & De Kalb*, for Appellant.

MR. JUSTICE HOLLOWAY delivered the opinion of the court.

In an action pending in the district court of Fergus county wherein Howard Tobey Weed was plaintiff and Eva Marie Weed was defendant, a decree of divorce was rendered and entered [1] which, among other things, awarded to plaintiff the care, custody and control of the minor child, the issue of the marriage. Later defendant moved the court to modify the decree and award the custody of the child to her, and supported the motion by her affidavit. Plaintiff appeared and moved the court to strike defendant's affidavit from the files and, his motion being overruled, he attempted to prosecute this appeal from that ruling.

"An appeal is authorized by statute only and unless the judgment or order which it is sought to have reviewed in this mode, falls fairly within the enumeration of appealable orders or judgments made by the statute, the appeal does not lie." (*Tuohy's Estate*, 23 Mont. 305, 58 Pac. 722; *Taintor v. St. John*, 50 Mont. 358, 146 Pac. 939.)

The appealable judgments and orders (in civil cases) are enumerated in section 7098, Revised Codes. The ruling complained of is not a judgment (sec. 6710, Rev. Codes) and it is not an appealable order, unless it can be classified as a special order made after final judgment. It is not every ruling made by a court in a cause after a final judgment has been entered therein, that is the subject of a separate appeal. If the con-

verse of this were true, there would never be an end to litigation if either party sought to harass or annoy the other. In *Chicago, M. & St. P. Ry. Co. v. White*, 36 Mont. 437, 93 Pac. 350, this court in construing the statute above, said: "The [2] special order, made after final judgment, from which an appeal lies, must be an order affecting the rights of some party to the action, growing out of the judgment previously entered, It must be an order affecting rights incorporated in the judgment." The decision has the support of the authorities generally. (*Greiss v. State Inv. & Ins. Co.*, 93 Cal. 411, 28 Pac. 1041; *Kaltschmidt v. Weber*, 136 Cal. 675, 69 Pac. 497; 3 Corpus Juris, 519.)

The affidavit was tendered as evidence in support of the motion under the provisions of section 7992, Revised Codes. The action of the court complained of did not affect the rights of either party. It was nothing more than an interlocutory ruling upon the admissibility of evidence made in the process of determining whether the decree should be modified, and until the court acted upon defendant's motion neither party was or could be prejudiced. If the court refused to modify the decree, appellant could not complain that defendant's affidavit was not stricken from the files. If defendant's motion should be granted, every ruling made by the court in its consideration of the motion could be reviewed on appeal from the order modifying the decree. (*Connell v. Warren*, 3 Idaho, 117, 27 Pac. 730.)

The statute does not authorize an appeal from the ruling complained of, and for this reason the attempted appeal is dismissed.

*Dismissed.*

MR. CHIEF JUSTICE BRANTLY and MR. JUSTICE COOPER concur.

STATE EX REL. SMITH, RELATOR, v. DISTRICT COURT  
ET AL., RESPONDENTS.

(No. 4,369.)

(Submitted March 15, 1919. Decided April 14, 1919.)

[179 Pac. 831.]

*Certiorari—District Courts—Judgments—Amendment—Jurisdiction—New Trial—Summons—Service—Defendants in Military Service—Voidable Judgments—Collateral Attack.*

District Courts—Judgments—Amendments—New Trial—Jurisdiction.

1. *Held*, on *certiorari*, that the district court was without power to so amend its order granting a decree of divorce after rendition and signing thereof, as in effect to award a new trial, on its own motion, on the ground of newly discovered evidence which "came to the knowledge of the court *ex parte*."

Same—New Trial—How to be Granted.

2. A new trial can be granted only in the manner, within the time and upon the grounds provided in the statute.

Same—New Trial—When Unauthorized.

3. The district court has no authority to grant a new trial upon its own motion.

[As to power of court to grant new trial on its own motion, see note in *Ann. Cas.* 1914A, 412.]

Same—Judgments—Amendments—Power of Court.

4. The district court may amend its judgment at any time in order to make it express what was actually decided, the mistake of the clerk in entering it not being binding upon the court nor upon the parties whose rights are prejudiced thereby.

Same.

5. A judgment once rendered as intended becomes final, and can be revised or corrected only by some method pointed out by the statute.

Same—Amendment of Judgments—Rule—Terms of Court.

6. *Quære*: Does the rule making a judgment once rendered as intended, final and correctible only in the mode pointed out by the statute, apply in those districts in which there are regularly fixed terms for holding court?

Judgments—Void on Face—Effect.

7. A judgment void on its face is a nullity and may be vacated at any time.

Summons—Affidavit of Person Serving—Contents.

8. Section 6518, Revised Codes, does not require that the affidavit of the person making service of a summons must contain the statement that he was not a party to the action and was over the age of eighteen years.

Same—Irregularity—Voidable Judgment—Collateral Attack.

9. The omission of the statement in the affidavit of the person who made service of summons in another state, that he was not a party

to the action and over the age of eighteen years, if required, was an irregularity merely, rendering the judgment voidable and not void; it was therefore not subject to collateral attack.

**Default Judgments — Defendant in Military Service — District Court — Jurisdiction.**

10. Failure of plaintiff to file the affidavit required by Chapter 8, Laws Extra Session, 15th Legislative Assembly, page 17, showing that defendant in default was not, at the time of the entry of judgment, in military service, did not affect the jurisdiction of the court to render the judgment and order it entered; omission to file was no more than an irregularity within jurisdiction.

**Same—Defendant in Military Service—Affidavit of Plaintiff—Purpose of Act.**

11. *Held*, that the purpose of section 4(a) *et seq.* of Chapter 8, *supra* (paragraph 10), is to delay entry of judgment in any case where defendant has defaulted, until the court has taken such measures and made such requirements of the plaintiffs as will furnish the defendant with protection against the enforcement of a judgment which may injuriously affect him or his interests while he is absent in military service.

Original application for writ of review, by the State on the relation of William G. Smith, against the District Court of Fergus County, and Roy E. Ayers, a Judge thereof, to annul an order striking its decree in the divorce proceeding of *Wm. G. Smith v. Myrtle D. Smith* from the files and continuing the case for further hearing. Order annulled.

*Mr. Edgar G. Worden, Mr. Ulysses A. Gribble and Mr. Hugh R. Adair*, for Relator, submitted a brief; *Mr. Gribble* argued the cause orally.

*Mr. Odell W. McConnell*, for Respondents, argued the cause orally.

MR. CHIEF JUSTICE BRANTLY delivered the opinion of the court.

*Certiorari* to the district court of Fergus county. The record discloses that on November 13, 1918, the relator brought his action against the defendant, who had left the state and become a resident of the state of Kentucky, to obtain a decree of divorce on the ground of desertion. Instead of service of summons by publication under section 6520 of the Revised Codes, personal service was had upon the defendant, as provided in section 6521.

The proof of service was made by affidavit, which, omitting formal parts, is the following:

"W. H. Myers, being first duly sworn, says: That I received the within summons on the 18th day of November, 1918, that I personally served the within summons on the 19th day of November, 1918, upon Myrtle D. Smith, the defendant named therein, by delivering a copy of said summons to her personally in the said county of Warren. That at the time when I served the within summons upon the said Myrtle D. Smith, and at the same place, I also served upon her a copy of the complaint upon which said summons was issued, by delivering said copy to her personally.

"W. H. MYERS, D. S."

Defendant having failed to appear in the action, her default was entered on December 31. On January 7 of this year, the court, Hon. Roy E. Ayers presiding, heard the evidence submitted by plaintiff, made its findings of fact and conclusions of law, and rendered and signed a decree granting him a divorce. On the same day, before the decree was entered and without notice to counsel, the court of its own motion amended its order granting the decree. The amended order is as follows: "This cause came on regularly to be heard this day, Mr. E. G. Worden appearing as counsel for plaintiff, defendant not appearing. The court now heard the proofs offered, the testimony of William G. Smith who was now duly sworn and examined on behalf of plaintiff, and the court being fully advised in the premises, thereupon it was ordered, adjudged and decreed that plaintiff have decree of divorce. It having come to the knowledge of the court, *ex parte*, that the court was without jurisdiction to grant the decree above ordered, for the reason that the plaintiff had not been deserted by the defendant for more than one year prior to his filing a complaint herein, praying for divorce on the ground of desertion, and the court being satisfied upon such information that further proof is necessary in the said case, it is hereby ordered that the said decree heretofore on this day made and signed in the case be, and the same is hereby, ordered



stricken from the files and records of the case and the case is continued for further hearing and evidence. And it is further ordered that the plaintiff and his counsel be notified of this order." The plaintiff then instituted this proceeding to have the order annulled, in so far as it directed the decree to be stricken from the files and records of the case and a further hearing to be had.

It will be observed that the court in amending the original [1] order did not formally set it aside or vacate the decree, but the effect of the amendment was to annul all former proceedings and leave the case in the condition in which it stood before the trial. In other words, by making the amendment to the order, the court in effect, on its own motion, awarded a new trial on the ground of newly discovered evidence; for notwithstanding the order recites that the court was without jurisdiction to grant the decree, the recital, "it having come to the knowledge of the court, *ex parte*, that the court was without jurisdiction \* \* \* , for the reason that the plaintiff had not been deserted by the defendant for more than one year," *etc.*, means nothing more nor less than that evidence had come to the knowledge of the court other than that submitted at the hearing. Hence its conclusion that its finding in this regard on the evidence submitted ought to have been other than that made.

This court pointed out in the early cases of *Whitbeck v. Montana Cent. Ry. Co.*, 21 Mont. 102, 52 Pac. 1098, and *Ogle* [2] *v. Potter*, 24 Mont. 501, 62 Pac. 920, that in this state relief by way of new trial can be granted only in the manner, within the time and upon the grounds provided in the statute, and that in the absence of observance by the moving party of the required steps, the court has no power to grant a new trial. The conclusion announced in these cases has been since adhered to. (*Porter v. Industrial Printing Co.*, 26 Mont. 170, 66 Pac. 839, 67 Pac. 67; *State ex rel. Walkerville v. District Court*, 29 Mont. 176, 74 Pac. 414.) A necessary result of this rule is [3, 4] that a court has no power to grant a new trial of its

own motion. It may amend its judgments in order to make them express what was actually decided. This may be done at any time, though the particular judgment has been entered by the clerk. A mistake by this officer in making the entry does not bind the court nor will it be permitted to prejudice rights [5] of parties. But when the court has once rendered its judgment as intended, though it may be erroneous, it becomes final and must stand until it has been revised and corrected by some method pointed out by the statute—generally through a motion for a new trial made by the losing party in the ordinary way, or on appeal. (*Whitbeck v. Montana Cent. Ry. Co.*, *supra*; *State ex rel. McHatton v. District Court*, *ante*, p. 324, 176 Pac. 608.)

There may be a question whether the foregoing rule applies [6] in those districts in which there are regularly fixed terms for holding court. Under the rule observed by the English courts and by the courts of those states in which the common-law practice prevails, a judgment rendered during the term may be revised at any time before the end of the term, because until that time the record had not been finally made up and is in the plenary control of the judge (23 Cyc. 860). But we are not now concerned with this question. This case arose in a county which is a district in itself, as did the two cases last cited *supra*, and, as was pointed out in *Whitbeck v. Montana Cent. Ry. Co.*, the common-law rule has no application.

Counsel for the respondents did not favor this court with a brief but made an oral argument at the hearing. He insisted that though the district court was in error in vacating the judgment for the reason stated in its order, the order should nevertheless be affirmed because upon the face of the record the judgment is void, in that it appears that the proof of service of summons was insufficient to give the court jurisdiction of the defendant, and in that the affidavit required by section 4(a) of the Act of the Extraordinary Session of the Fifteenth Legislative Assembly (Chap. 8, Laws Extra. Session, 15th Legislative Assembly, p. 17), showing that the defendant was not in

military service, was not filed before judgment was rendered. If we admit counsel's premises, the conclusions he draws from [7] them necessarily follow. A judgment void on its face is a mere nullity and serves no purpose other than to encumber the court's records. It may be vacated at any time (1 Freeman on Judgments, sec. 98; 1 Black on Judgments, sec. 307; 23 Cyc. 913; *People v. Greene*, 74 Cal. 400, 5 Am. St. Rep. 448, 16 Pac. 197; *Olney v. Harvey*, 50 Ill. 453, 99 Am. Dec. 530.) The particular respect in which it was urged that the proof of service was insufficient, was that the affidavit of Myers does not contain the statement that he was not a party to the action, and that he was over the age of eighteen years. By reference to the statute declaring how proof of service must be made (Rev. Codes, sec. 6518), we observe that it does not require the affidavit to state the facts showing the competency of the person making the service. It merely requires the affidavit to show service of the summons and a copy of the complaint when service of the latter is required. The affidavit here shows a literal compliance with this requirement. The omission of the [8] statement showing the competency of Myers at best only constitutes an irregularity, rendering the judgment voidable and not void. It is therefore valid as against collateral attack. Such would have been the result if the service had been made in this state (*Burke v. Inter-State S. & L. Assn.*, 25 Mont. 315, 87 Am. St. Rep. 416, 64 Pac. 879); and since it was not questioned by counsel that the order for publication had been regularly made as provided in section 6520 of the Revised Codes, and since personal service outside the state thereafter is made the equivalent of service by publication by section 6521 (*McLean v. Moran*, 38 Mont. 298), there is no valid reason why the result should not be the same here. In *Burke v. Inter-State S. & L. Assn.*, *supra*, the attack upon the judgment was collateral, by objection to the introduction of it as evidence. The proof of service was the same as in this case. This court held that the service, though irregular, was nevertheless service sufficient to give the court jurisdiction, rendering the judgment

voidable only and not subject to collateral attack. Here attack is made upon the judgment by objection to the sufficiency of the proof of service of summons only, by way of argument in this court. We think the judgment not open to attack in this way, nor otherwise except by appeal or by proper application to the trial court.

Nor do we think the omission to file the affidavit required by [10] the statute cited, showing that the defendant was not at the time in military service, renders the judgment void. If it be assumed that the definition of the expression "persons in military service," found in section 2 of the Act, included the defendant, the failure to file the affidavit did not affect the jurisdiction of the court to render the judgment and order it entered. Section 4(a) declares: "That in any action or proceeding commenced in any court, if there shall be a default of an appearance by the defendant, the plaintiff before entering judgment, shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit, plaintiff shall, in lieu thereof, file an affidavit setting forth that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest and the court shall, on application, make such appointment." Then follow provisions to the effect that unless it appears that the defendant is not in military service, the court may require as a condition before judgment is entered that the plaintiff file a bond to indemnify him against any loss or damage that he may suffer by reason of the judgment. The court is also authorized to make any other order, or to enter such a judgment as in its opinion may be necessary to protect the defendant. These are all the provisions in the Act on this subject. A mere

reading of them makes it clear that they have to do only with the entry of judgments in order to render them enforceable, and not the rendition of judgments. In other words, their purpose is to delay the entry of judgment in any case when there has been a default, until the court has taken such measures and made such requirements of the plaintiff as will furnish the defendant with all necessary protection against the enforcement of a judgment which may injuriously affect him or his interests while he is absent in military service. The filing of the affidavit does not affect the power of the court to render judgment, nor would the omission to file it affect the judgment after entry or be more than an irregularity within jurisdiction.

The order is annulled.

*Order annulled.*

MR. JUSTICE HOLLOWAY and MR. JUSTICE COOPER concur.



# MEMORANDA

OF

DECISIONS RENDERED WITHOUT EXTENDED OPINIONS DURING THE PERIOD EMBRACED IN THIS VOLUME.

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No. 4,089.—POSTAL TELEGRAPH CABLE CO., APPELLANT,  
v. JOSEPH P. DONOVAN ET AL., RESPONDENTS.

*Appeal from District Court, Silver Bow County.*

Decided May 6, 1918.

PER CURIAM.—Upon motion of the appellant herein the appeal in the above-entitled cause is hereby dismissed.

*Mr. J. A. Poore*, for Appellant.

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No. 3,920.—STATE, RESPONDENT, v. ERNEST GUIDETTE,  
APPELLANT.

*Appeal from District Court, Richland County; C. C. Hurley, Judge.*

Decided May 31, 1918.

PER CURIAM.—Upon motion of the appellant herein and for good cause shown, the appeal in the above-entitled cause is this day dismissed.

*Mr. R. O. Lunke* and *Mr. Henri J. Haskell*, for Appellant.

*Mr. Jos. B. Poindexter*, Attorney General, for the State.

No. 4,155.—IN THE MATTER OF THE ESTATE OF W. A. WELLS,  
DECEASED.

*Appeal from District Court, Carbon County; A. C. Spencer,  
Judge.*

Decided May 31, 1918.

PER CURIAM.—Upon motion of the appellant herein, the  
appeal in the above-entitled cause is this day dismissed.

*Mr. W. A. Walls, Mr. E. E. Enterline and Mr. R. G. Wiggens-  
horn, for Appellant.*

*Mr. H. C. Crippen and Messrs. Goddard & Clark, for  
Respondent.*

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Nos. 4,064, 4,149.—KATHERYN BOWN, RESPONDENT, v.  
BENJAMIN W. BOWN, APPELLANT.

*Appeal from District Court, Missoula County; R. Lee Mc-  
Culloch, Judge.*

Decided June 17, 1918.

PER CURIAM.—Upon motion of the appellant herein, the  
appeals in the above-entitled causes are this day dismissed.

*Messrs. McCormick & Russell, for Appellant.*

*Messrs. Mulroney & Mulroney, for Respondent.*



No. 4,148.—STATE, RESPONDENT, v. EDITH B. COLBY,  
APPELLANT.

*Appeal from District Court, Sanders County, in the Fourth Judicial District; J. M. Clements, a Judge of the First District, presiding.*

Decided June 22, 1918.

PER CURIAM.—Pursuant to the motion of respondent herein, and for good cause shown, the appeal in the above-entitled action is hereby dismissed.

*Mr. J. T. Mulligan, of the Bar of Spokane, Washington, and Mr. H. C. Schultz, for Appellant.*

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No. 4,246.—THAD S. SMITH, RESPONDENT, v. JACOB MILLER, APPELLANT.

*Appeal from District Court, Yellowstone County; A. C. Spencer, Judge.*

Decided September 1, 1918.

PER CURIAM.—The motion of respondent to dismiss the appeal herein was, after due consideration by the court, granted and the appeal is accordingly dismissed.

*Mr. B. L. Price and Messrs. Delavou & Moore, for Appellant.*

*Mr. Thad S. Smith, for Respondent.*

No. 4,292.—STATE EX REL. JACOB MILLER, RELATOR, v.  
DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of review to the District Court of Yellowstone County, and A. C. Spencer, Judge.

Decided October 11, 1918.

PER CURIAM.—Application for writ of review herein was this day, after due consideration by the court, denied.

*Mr. B. L. Price and Messrs. Delavou & Moore, for Relator.*

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No. 4,291.—LEO H. McCLELLAN, APPELLANT, v. CHAS. D.  
McLURE ET AL., RESPONDENT.

*Appeal from District Court of Granite County, in the Third Judicial District; R. Lee McCulloch, a Judge of the Fourth District, presiding.*

Decided October 16, 1918.

PER CURIAM.—Pursuant to stipulation of the parties herein, the appeal in this cause is hereby dismissed.

*Mr. H. H. Parsons and Mr. S. P. Wilson, for Appellant.*

*Mr. Wingfield L. Brown, Mr. R. Lewis Brown and Messrs. Maury, Wheeler & Melzner, for Respondents.*

No. 4,299.—ANKER O. TORRISON, APPELLANT, v. C. P. CASTLE ET AL., RESPONDENTS.

*Appeal from District Court, Teton County.*

Decided November 9, 1918.

PER CURIAM.—Respondents' motion to dismiss the appeal in the above-entitled cause is hereby granted and the appeal accordingly dismissed.

*Messrs. Kots & Molumby, for Appellant.*

*Messrs. Norris & Hurd, for Respondents.*

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No. 4,322.—STATE EX REL. S. C. FORD, ATTORNEY GENERAL, RELATOR, v. SAM L. ANDERSON, COUNTY CLERK OF SILVER BOW COUNTY, RESPONDENT.

Original application for writ of mandate to compel the respondent, as clerk and recorder of Silver Bow County, to permit relator, his assistants and such other persons as he might employ, to inspect and examine all public documents and records relating to the general election held in Silver Bow county on November 5, 1918. Alternative writ ordered issued on November 26, 1918, made returnable on December 2, 1918.

NOTE: The court thereafter, and prior to the day set for hearing, having been notified that respondent Anderson had complied with the writ asked for by relator, on December 9 ordered that respondent pay the costs of the application, amounting to \$10.45.

*Mr. S. C. Ford, Attorney General, and Mr. Frank Woody, Assistant Attorney General, for Relator.*

No. 4,138.—FRED C. AUGOOD, RESPONDENT, *v.* FRANK L. HOAR, RESPONDENT; GREAT NORTHERN RY. CO., APPELLANT.

*Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.*

Decided December 30, 1918.

PER CURIAM.—Pursuant to stipulation of the parties herein, it is ordered that the appeal in the above-entitled cause be, and the same is hereby, dismissed, each party paying his own costs.

*Messrs. Veazey & Veazey, for Appellant.*

*Messrs. McCaffery & Tyler, for Respondent Augood.*

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No. 4,334.—C. C. BRONSON, RESPONDENT, *v.* THOMAS FITCH, APPELLANT.

*Appeal from the District Court, Hill County.*

Decided December 30, 1918.

PER CURIAM.—Upon motion of respondent to dismiss the appeal herein for failure of appellant to file his record on appeal within the time prescribed by law, the appeal is hereby dismissed.

*Mr. Talbert Erickson, for Appellant.*

*Messrs. Stranahan & Stranahan, for Respondent.*

No. 4,152.—CIPRIANO GARRIGA, RESPONDENT, v. CHICAGO, MILWAUKEE & ST. P. RY. CO., APPELLANT.

*Appeal from District Court, Missoula County; Theo. Lentz, Judge.*

Decided January 20, 1919.

PER CURIAM.—The above-entitled cause having been compromised and settled, the appeal herein is hereby dismissed as per stipulation of the parties.

*Mr. Henry C. Stiff*, for Appellant.

*Messrs. Mulroney & Mulroney*, for Respondent.

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No. 4,355.—STATE EX REL. MARY SATRANG, RELATRIX, v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of prohibition against the District Court in and for the County of Fergus, and Roy E. Ayers, a Judge thereof, to prohibit respondents from proceeding further in the cause entitled *Mary Satrang v. Helen L. Warr et al.*, pending in said District Court.

Decided January 24, 1919.

PER CURIAM.—The petition of relatrix herein for a writ of prohibition against the above-named respondents, presented to the court this day, is after due consideration denied.

*Mr. John A. Coleman*, for Relatrix.

No. 4,359.—STATE EX REL. HAZEL LOUNDAGIN, RELATRIX,  
v. DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of supervisory control against the District Court of Chouteau County and John W. Tattan, Judge thereof. On return day, February 10, 1919, respondents did not appear; relatrix presented her proof, and the cause was submitted for judgment and decision.

Decided February 13, 1919.

PER CURIAM.—This cause coming on for judgment and decision, it is now here ordered and adjudged by this court that a writ of supervisory control issue as prayed for, directing the district court of Chouteau county, and the Honorable John W. Tattan, judge thereof, to set aside the order made on Friday, January 10, 1919, revoking the order made on January 8, 1919, transferring the cause entitled *Hazel Loundagin v. Herbert Buhl et al.*, to the district court of Cascade county for trial, and to enter an order retransferring said cause to Cascade county for trial. Costs herein to be taxed against respondents.

*Mr. H. S. McGinley*, for Relatrix.

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No. 4,367.—STATE EX REL. W. F. DUNN ET AL., RELATORS, v.  
DISTRICT COURT ET AL., RESPONDENTS.

Original application for writ of prohibition to restrain the District Court in and for the County of Lewis and Clark, and R. Lee Word, a judge thereof, from proceeding with the trial of the cause entitled *The State of Montana v. W. F. Dunn et al.*, pending in said court.

Decided February 17, 1919.

PER CURIAM.—This cause, coming on for judgment and decision, it is, on consideration, now here ordered and adjudged by this court that the motion to quash interposed by respondents, be and the same is hereby sustained and the proceeding is accordingly dismissed.

*Messrs. Nolan & Donovan* and *Messrs. Wheeler & Baldwin*,  
for Relators.

*Mr. Lester Dodle*, County Attorney of Lewis & Clark County,  
and *Mr. Jos. B. Wine, Jr.*, Assistant County Attorney, for  
Respondents.

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No. 4,382.—STATE EX REL. S. V. STEWART, GOVERNOR,  
ET AL., AS MEMBERS OF THE STATE BOARD OF EQUALIZATION,  
RELATORS, v. C. H. MARTIEN, COUNTY ASSESSOR, RE-  
SPONDENT.

Original application by relators as members of the State Board of Equalization of the State of Montana, for writ of mandate to compel the respondent, as assessor of the county of Lewis & Clark, in listing, valuing and assessing property for taxation in said county for the year 1919, to comply with the provisions of House Bill 30, passed by the Sixteenth Legislative Assembly and approved on February 28, 1919, and with the instructions and directions of the State Board of Equalization.

Decided March 20, 1919.

PER CURIAM.—The application of relators for writ of mandate herein was this day, after due consideration, denied.

*Mr. S. C. Ford*, Attorney General, for Relators.

No. 4,385.—ARTHUR WILLIAMS, RESPONDENT, *v.* GREAT  
NORTHERN RAILWAY CO., APPELLANT.

Decided March 24, 1919.

PER CURIAM.—Pursuant to stipulation of the parties, the  
appeal herein is this day dismissed.

*Messrs. Veazey & Veazey and Mr. W. L. Clift*, for Appellant.

*Mr. George D. Toole*, for Respondent.

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No. 4,395.—STATE EX REL. WM. F. DUNN, RELATOR, *v.* CHAS.  
H. TREACY, CITY CLERK, RESPONDENT,

and

No. 4,396.—STATE EX REL. JAMES J. MCCARTHY, RELATOR,  
*v.* CHAS. H. TREACY, CITY CLERK, RESPONDENT.

Original applications for writ of mandate to compel respondent, as clerk of the city of Butte, Montana, to place the names of relators in the above-entitled proceedings upon the official ballot and the voting machines to be used in the municipal election to be held in said city on the seventh day of April, 1919.

Decided April 5, 1919.

PER CURIAM.—This cause having this day, after taking of proof and hearing arguments of counsel for respective parties, been submitted for judgment and decision, the court, after due consideration, being of opinion that within the time intervening between the hour of submission (at about 4:30 in the afternoon of Saturday, April 5, 1919), and the day of election (the Monday following, April 7, 1919), it could not intelligently examine



and determine the important questions presented by counsel, and for the further reason that after said election such questions would be only moot questions, hereby orders and adjuges that the above causes be dismissed.

*Messrs. Wheeler & Baldwin and Messrs. Nolan & Donovan,*  
for Relators.

*Mr. Henry C. Smith, Mr. William T. Pigott, Mr. D. M. Kelly,*  
and *Mr. William Meyer,* for Respondent.

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No. 4,393.—O. E. EVANS, APPELLANT, v. J. H. MORAN and  
AETNA CASUALTY & SURETY CO., RESPONDENTS.

*Appeal from District Court, Richland County; C. C. Hurley,*  
*Judge.*

Decided April 14, 1919.

PER CURIAM.—Upon motion of respondent herein, and for the reason that the above-named appellant has failed to file the record on appeal herein within the time specified by law, the appeal in this cause is hereby dismissed.

*Mr. F. P. Leiper and Mr. F. J. Matoushek,* for Respondents.

*Mr. R. O. Lunke,* for Appellant.



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### ABANDONMENT.

See Mines and Mining, 2; Waters and Water Rights, 4, 10, 12.

### ACCOUNT STATED.

What is not.

1. In an action to recover commissions on sales of farm implements under an agency contract, a "settlement sheet," the debit and credit sides of which apparently balanced and which was signed by plaintiffs, *held*, under the circumstances, not to constitute an account stated, i. e., an agreement that nothing was due them for services performed in making the sales.—*Bjorneby v. Minneapolis Threshing Machine Co.*, 287.

What may Constitute.

2. The approval of an account against an estate by the decedent in his lifetime after examination of it and his expressed intention to pay it constituted it an account stated, and proof of the separate items thereof was not necessary to entitle plaintiff to recover.—*Roy v. King's Estate*, 567.

Action on Open Account—Evidence.

3. Evidence showing an account stated is sufficient to support a cause of action on an open account.—*Roy v. King's Estate*, 567.

### ACKNOWLEDGMENTS.

To entitle instrument to record, must be acknowledged by whom,—see Records, 1.

### ACTIONS.

Conversion of property of intestate—Right of action in *posthumous* heir,—see Descent and Distribution.

Prosecution of,—see Injunction, 7, 8.

Right of action,—see Waiver, 4.

Dismissal—Want of Prosecution—Discretion.

1. Whether an action should be dismissed for want of prosecution is a question addressed to the discretion of the trial court.—*Silver v. Eakins*, 210.

### ADMISSIONS.

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### AGENCY.

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### AGREED STATEMENTS.

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## AMENDMENTS.

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## APPEALABLE ORDERS.

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## APPEAL AND ERROR.

Nonprejudicial error,—see Harmless Error.

Criminal Law—Conflicting Evidence—Judgment—Review.

1. The verdict of the jury in a capital case based on conflicting testimony and approved by an order overruling a motion for a new trial will not be disturbed on appeal.—State v. Inich, 1.

Same—Trial—Exceptions—Review.

2. Rulings of the court made during the trial of a criminal cause to which no exceptions were reserved are not reviewable on appeal.—State v. Inich, 1.

Same—Appeal—Exceptions—Briefs—Assignments of Error—Waiver.

3. Assignment of error based upon alleged objectionable remarks made during trial by the county attorney but not excepted to nor argued in appellant's brief will be deemed waived.—State v. Inich, 1.

Same—Trial—Remarks by Judge—Harmless Error.

4. Where the trial court in its instructions admonished the jury to disregard any comments or remarks made by it in admitting or excluding evidence, alleged error in this regard was rendered harmless.—State v. Inich, 1.

Conflicting Evidence—Review.

5 and 6. Where the evidence is in sharp conflict and that of plaintiff does not appear so inherently improbable that it cannot be true, a verdict for plaintiff will not be disturbed.—Moelleur v. Moelleur, 30.

Findings—Conflicting Evidence.

7. The findings of the district court made in a law action tried without a jury will be accepted as final on appeal if there is any substantial evidence to support them.—Teagarden v. Calkins, 35.

Appeal—Record—Sufficiency.

8. Where the record on appeal contains certified copies of the papers making up the judgment-roll, the fact that it does not contain a copy of such roll made up and certified as such does not demand a dismissal of the appeal.—Eby v. City of Lewistown, 113.

Offer of Proof—When Unnecessary.

9. The rule requiring an offer of proof by the party who desires to preserve for review a ruling sustaining an objection to a question put to a witness does not apply when the question indicates the evidence sought, or where the effect of the ruling is to exclude all evidence on a given subject under a mistaken notion that it is not within the issues.—Eby v. City of Lewistown, 113.

Criminal Law—Appeal—Prejudice—Presumptions.

10. Prejudice to appellant in a criminal cause will not be presumed but must be made to appear, either affirmatively by the record or by

a denial or invasion of a substantial right from which the law imputes prejudice.—*State v. Hall*, 182.

**Bill of Exceptions—Certificate—Effect.**

11. Where the record on appeal recites that a deed was offered and received in evidence, but the instrument is absent from the transcript, a recital in the certificate that the bill of exceptions contains all the evidence is of no avail in face of the affirmative showing that it does not.—*Lee v. Laughery*, 238.

**Judgments—Correct Result—Wrong Reason—Surplusage.**

12. Where the correct result was reached in an action involving title to real property, it is immaterial that the court adopted a wrong theory and, the judgment being sufficient, any unnecessary recitals in it will be treated as surplusage.—*Lee v. Laughery*, 238.

**Pleading—Inconsistency—Theory of Case.**

13. Plaintiff's allegation that he acquired title to a ditch by prescription having been surplusage, he was not estopped, on the ground of inconsistency, to assert an appeal that he obtained title by exchange of one ditch for another.—*Babcock v. Gregg*, 317.

**Injunction—Findings—New Trial—Review of Evidence.**

14. The question of the sufficiency of the evidence to support the findings of the court in a suit for an injunction may be raised on appeal from the order denying a new trial.—*Babcock v. Gregg*, 317.

**Bill of Exceptions—Settlement and Certification—Presumptions.**

15. Where the presumption of correctness arising from the settlement and certification of a bill of exceptions is not rebutted, it is conclusive.—*State v. Tate*, 343.

**Conflict in Evidence—Affirmance.**

16. Where a verdict, based upon evidence in substantial conflict has the approval of the district court as shown by its denial of a new trial, the supreme court will not interfere even though the evidence as appearing in the record, seems to preponderate in favor of the appellant.—*Matoole v. Sullivan*, 363.

**Theory of Case.**

17. On appeal a party is bound by the theory upon which he tried his case in the district court.—*Roberts v. Sinnott*, 369.

**Conflict in Evidence—Affirmance of Judgment.**

18. Where a verdict rendered on substantially conflicting evidence and which has the indorsement of the trial judge as evidenced by his refusal to grant retrial, the supreme court will not interfere.—*Roberts v. Sinnott*, 369.

**Appeal—Correct Ruling—Wrong Reason.**

19. Where a ruling of the district court in the exclusion of evidence was right, the fact that the reason for it was erroneous is immaterial.—*Roberts v. Sinnott*, 369.

**Law of Case.**

20. A holding of the supreme court on appeal becomes the law of the case on a retrial and on a subsequent appeal.—*Barnard Realty Co. v. City of Butte*, 384.

**Equity Cases—Extent of Review.**

21. The supreme court on appeal in equity cases must, under section 6253, Revised Codes, review and determine all questions of fact, due allowance being made for the more advantageous position occupied by the trial judge in passing upon the credibility of the witnesses, as well as questions of law, unless for good cause shown a new trial should be ordered.—*Barnard Realty Co. v. City of Butte*, 384.

**Same—Decree Based on Incompatible Theories—Review.**

22. Under section 6253, Revised Codes, the supreme court will in an equity case, the decree in which was founded upon incompatible theories, dispose of the cause on its merits, all the evidence being presented in the record, by eliminating from the decree findings based upon the erroneous theory, and adopting those founded upon the correct one supported by the evidence.—*Lowry v. Carrier*, 392.

**Agreed Statement—Extent of Review.**

23. In a cause decided by the district court upon an agreed statement of facts (Rev. Codes, sec. 6769), the office of the supreme court on appeal goes no further than to ascertain and determine whether the trial court drew the correct inference from the facts stipulated and rendered the proper judgment.—*Read v. Lewis and Clark County*, 412.

**Same—Conclusiveness.**

24. Where an agreed statement of facts disclosed that a written contract involving the transfer of real and personal property was understood and intended by the grantor and grantees as granting a right to exercise an option to purchase, all others were concluded from asserting that the transaction constituted a sale.—*Read v. Lewis and Clark County*, 412.

**Same—Conclusiveness.**

25. An agreed statement of facts voluntarily made and submitted to the trial court is binding upon the parties and the court.—*Read v. Lewis and Clark County*, 412.

**Effect of Perfection of Appeal—District Courts—Jurisdiction.**

26. After an appeal had been perfected by intervenor from a judgment dismissing his complaint, the district court lost jurisdiction of the cause so far as his rights were concerned, and was without authority subsequently to decree that he was not entitled to any of the funds in controversy in the action in which he sought to intervene.—*Moreland v. Monarch Mining Co.*, 419.

**New Trial—Setting Aside Order—Showing Necessary.**

27. It is only upon a very strong showing that the supreme court will on appeal set aside an order granting a new trial.—*State v. Schoenborn*, 517.

**Same—Criminal Law—Appeal—Extent of Review.**

28. Where, on appeal by the state from an order granting defendant a new trial on the ground that the verdict returned was contrary to the evidence, it appears that the judge who tried the cause also granted the motion, the supreme court is limited in its review to an examination of the record to ascertain whether there is any substantial conflict in the evidence, or an absence of evidence necessary to make out a case.—*State v. Schoenborn*, 517.

**Same—Criminal Law—Appeal and Error—Duty of Appellant.**

29. An order granting a new trial to defendant in a criminal cause made by a district judge other than the one who tried it, on the ground that the verdict was contrary to the evidence, required a determination of the weight of the evidence—an exercise of judicial function—and the burden of showing that the district judge could not, in the exercise of sound judgment, conclude from the record that the evidence was insufficient to justify the verdict was upon the state.—*State v. Schoenborn*, 517.

**Presumptions.**

30. In entering upon its consideration of an appeal, the supreme court indulges the presumption that the judgment or order from which the

appeal is taken is correct, the burden being upon appellant to show reversible error.—*State v. Schoenborn*, 517.

**Intoxicating Liquors—Seizure and Destruction—Final Judgment—Appeal.**

31. The trial of the questions of ownership and the purpose for which seized liquors were being kept by the claimant, is one *inter partes*, and results in a final judgment affecting the rights of the state and the claimant, from which, under section 7098, Revised Codes, either party may appeal.—*State ex rel. Prato v. District Court*, 560.

**New Trial—Notice of Intention—Presumptions.**

32. In the absence of a showing of lack of notice in appellants of the hearing of a motion for a new trial, it will be presumed that the proceedings were regular and that they had notice.—*Lish v. Martin*, 582.

**Pleadings—Sufficiency—New Trial Order—Review.**

33. The sufficiency of a complaint not drawn in question in any way during trial could not be considered by the district court on the hearing of the motion for a new trial, and may not be passed upon by the supreme court on appeal from the order denying it; its sufficiency being reviewable only on appeal from the judgment.—*Glendenning v. Slayton*, 586.

**Nonappealable Orders.**

34. An appeal does not lie from an order overruling a motion to strike an affidavit filed in support of a motion for the modification of a decree granting a divorce, such order not being one of the orders made appealable by section 7098, Revised Codes, nor a special order made after final judgment from which an appeal may be taken.—*Weed v. Weed*, 599.

**Special Order After Final Judgment—When Appealable.**

35. The special order made after final judgment from which an appeal lies must be one affecting rights incorporated in a judgment previously entered.—*Weed v. Weed*, 599.

**ARGUMENT.**

Of counsel for defendant in criminal prosecution—Unwarranted curtailment by court,—see *Attorney and Client*, 5-7.

**ASSESSORS.**

See *Taxation*.

**ASSUMPSIT.**

Breach of trust,—see *Trusts*, 1.

**ATTACHMENT.**

Enjoining proceedings,—see *Injunctions*, 12.

Growing crops subject to,—see *Mortgages*, 1.

**Intervention—Right of Third Party Claimant.**

1. A third party who claimed to own property which had been attached to secure any judgment which might be recovered in an action, had such an interest in the subject matter of the litigation as to entitle him under section 6496, Revised Codes, to intervene and have his rights determined.—*Moreland v. Monarch Mining Co.*, 419.

**Same—Alternative Remedies—Effect.**

2. The fact that a party claiming an interest in attached property may have a remedy, after seizure or sale, under section 6673, Revised Codes, or by an action in conversion or replevin, does not deprive him of his right to intervene in the action in which the attachment was procured. *Moreland v. Monarch Mining Co.*, 419.

**ATTORNEY AND CLIENT.**

**Fees**—When special administrator entitled to,—see *Executors and Administrators*, 9.

**Disbarment—Deceiving Court—False Testimony.**

1. *Held*, that an attorney who testified at a divorce proceeding that the defendant was insane at the time he entered into the marriage contract, although he had himself advised the marriage and knew that he was incompetent, was guilty of an attempt to deceive the trial court and merits disbarment.—*In re O'Keefe*, 200.

**Same—Deceiving Court—False Testimony—Defenses.**

2. Where an attorney is shown to have knowingly and willfully testified falsely to aid a litigant to establish a baseless claim, the fact that the trial court did not believe but rejected his testimony is no defense in a proceeding for his disbarment under a charge that he attempted to deceive the court.—*In re O'Keefe*, 200.

**Retention of Funds—Disbarment or Suspension.**

3. Where an attorney admits his guilt of professional misconduct consisting of failure for some thirty-one months to account to his client for moneys collected in satisfaction of judgments procured in the latter's favor, the supreme court must, under sections 6418 and 6420 of the Revised Codes, either disbar him permanently or suspend him for a limited period, according to the gravity of the offense.—*In re Burke*, 303.

**Same—Suspension.**

4. *Held*, in view of extenuating circumstances exceptional in their nature, and the fact that accused had made full payment to his client of the moneys due him with interest, since commencement of disbarment proceedings against him, that suspension for a period of ninety days is sufficient punishment for the offense referred to above.—*In re Burke*, 303.

**Criminal Law—Trial—Argument to Jury—Duty of Attorney.**

5. It is the duty of counsel for defendant charged with crime to present the case of his client on argument in the light most favorable to the latter, and to that end to urge upon the jury all inferences from and interpretations of the evidence which are not palpably unwarranted, and so long as he does not misstate the testimony, his privilege in this respect is almost without limit.—*State v. Tate*, 343.

**Same—Trial—Curtailling Argument to Jury—Prejudicial Error.**

6. Refusal of the court to permit defendant's counsel to comment in his argument to the jury upon statements touching a material fact made by the prosecutrix and her sister, which were contradictory of each other, was prejudicial error, entitling defendant to a new trial.—*State v. Tate*, 343.

**Same—Trial—Evidence—Remarks by Court—Invading Province of Jury.**

7. Remarks of the trial judge during argument of defendant's counsel, to the effect that prosecutrix and her sister had not testified to a certain material fact as counsel asserted they had, that no juror was in doubt about that, *etc.*, whereas such testimony had in



fact been given, virtually resulted in a withdrawal of their statements from the jury and constituted prejudicial error.—*State v. Tate*, 843.

## AUTOMOBILES.

See Personal Injuries, 5-9.

## BANKRUPTCY.

## "Preference"—Definition.

1. A "preference," within the meaning of the Bankruptcy Act (32 U. S. Stats. at Large, 799), is a transfer of the bankrupt's property by means of which a creditor is enabled to obtain a greater percentage of his debt than other of the bankrupt's creditors.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## What not Unlawful Preference.

2. Though a transfer of a bankrupt's property may amount to a preference, it is not unlawful in the sense that it may be avoided by the trustee in bankruptcy if made within a specified time, unless the creditor receiving it had reasonable cause to believe that the debtor intended thereby to give him a preference.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## Preference—How Made.

3. To constitute a transfer of a bankrupt's property an unlawful preference, it is not necessary that it be made directly to the creditor; if it is made by another for his benefit, it falls within the prohibition of the Bankruptcy Act.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## Same—Evidence—Insufficiency.

4. Where the evidence was insufficient to show that at the time appellant accepted payment from building contractors for material furnished by it to a subcontractor who thereafter was adjudged a bankrupt, it had reason to believe that preferences were intended thereby, a finding of the jury that appellant did receive preferences held unwarranted.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## Same.

5. Knowledge in defendant supply company at the time it received payments on accounts due it from one subsequently adjudged a bankrupt, that he then was an absconding insolvent, was sufficient to charge it with notice that it was receiving preferences declared unlawful by the Bankruptcy Act.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## Same—What not Defense.

6. Where, in order to enable them to deliver buildings clear of claims of lien, contractors paid for supplies furnished to and remaining unpaid by a subcontractor, who thereafter was adjudged a bankrupt, defendant's contention in an action by a trustee in bankruptcy to recover the payments as unlawful preferences, that the payors bore to the owners of the buildings the relation of sureties or indorsers for the bankrupt and that therefore the payments made by them constituted a discharge of their own liabilities to defendant supply company, and did not amount to preferences, held without merit.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

## Same—Instructions—Inapplicability.

7. An instruction that payment of money, due a bankrupt, to the bankrupt's creditor to avoid the possibility of the filing of a materialman's lien by the creditor, would not be a defense in an action to recover the payment as an unlawful preference under the Bankruptcy

Act, was proper, in the absence of evidence that the defendant had perfected such lien.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.

### BANKS AND BANKING.

See, also, *Bills and Notes*.

Bank books—Copies of entries—Inadmissibility,—see *Evidence*, 17.

National bank stock—Taxation,—see *Taxation*, 24–26.

Deposits in trust,—see *Trusts*, 1–3; *Escrow*, 1, 2.

Deposits—Ownership.

1. When money is deposited in a bank it becomes its property, the bank assuming the relationship of debtor toward the depositor; hence use of it by the bank is a use of its own and not the depositor's funds.—*In re Williams' Estate*, 63.

Renewal—Promissory Notes—Marking Unpaid Note "Paid"—Effect.

2. In the absence of an agreement to the contrary, the effect of the renewal of a promissory note is to extend the time of payment, not to discharge the obligation, the act of the cashier of the payee bank in stamping "paid" upon the old note not changing the rule.—*First State Bank of Hilger v. Lang*, 146.

Authority of Cashier.

3. The cashier of a bank, being its agent, cannot accept payment of a note in anything but money, in the absence of special authority to that effect.—*First State Bank of Hilger v. Lang*, 146.

Same—Ostensible Authority.

4. Where the directors of a bank by inattention to their duties permit its cashier to conduct its affairs in a certain manner for a period sufficiently long to establish a settled course of business, his authority to do anything the board of directors might have authorized him to do will be implied in favor of an innocent third party, even though the bank is defrauded by his acts.—*First State Bank of Hilger v. Lang*, 146.

Cashier—Ostensible Authority—Who cannot Assert.

5. The president of a bank who himself, as one of the board of directors, had carelessly permitted its cashier to conduct its affairs in his own way, was in no position to assert his own misconduct as the basis of ostensible authority in the cashier to release him from liability on a note on which his name appeared as one of the makers.—*First State Bank of Hilger v. Lang*, 146.

Same—Ostensible Authority—How Conferred.

6. Ostensible authority, within the meaning of section 5432, Revised Codes, in an agent (a bank cashier) to do an otherwise unauthorized act, is not conferred by an isolated act of carelessness on the part of his principal, but can be derived only from a long course of misconduct indulged in by the latter.—*First State Bank of Hilger v. Lang*, 146.

Same—Releasing Security.

7. Without authority from the board of directors of a bank, neither the president nor its cashier can release one of its debtors from liability on a note, and where such power is asserted, clear and convincing proof is required to show that the board intended to confer it.—*First State Bank of Hilger v. Lang*, 146.

Same—Directors—Dealing With Corporation—Burden of Proof.

8. Whenever it appears that a director has been dealing with his bank, the burden is on him to show that his dealings have been fair and honest and that it has not suffered from his acts.—*First State Bank of Hilger v. Lang*, 146.

**Same—Ratification of Act of Cashier.**

9. Under section 5429, Revised Codes, it is essential to the ratification of an unauthorized act of an agent, that the principal had full knowledge of all material facts relative to the transaction at the time of the alleged ratification.—*First State Bank of Hilger v. Lang*, 146.

**Same—Ratification of Act of Cashier—Availability of Defense.**

10. While knowledge of the affairs of a bank by its directors will be presumed in favor of an innocent third party where ratification of an unauthorized act of its cashier is alleged, no such presumption is indulged in favor of its president, who is also a director and who seeks to profit by such act, resulting in his release from liability on a promissory note signed by him as an accommodation maker.—*First State Bank of Hilger v. Lang*, 146.

**Same.**

11. Since the effect of an action against the maker of a note on which defendant bank president was jointly liable was to lessen the latter's liability by recovering what could be recovered from his comaker, defendant was not in position to assert that by bringing that action, the bank had ratified the unauthorized conduct of its cashier (par. 10, above) and thus discharged him from further liability.—*First State Bank of Hilger v. Lang*, 146.

**Authority of Cashier—Question of Law—Directed Verdict.**

12. Where the evidence touching the actual and ostensible power of a bank cashier to release security was undisputed, the question of his authority in the premises was one of law and the trial court could properly direct a verdict.—*First State Bank of Hilger v. Lang*, 146.

**BILL OF EXCEPTIONS.**

**Certificate—Effect**,—see Appeal and Error 11.

**Settlement**,—see Laches.

**Settlement and Certification—Presumptions.**

1. Where the presumption of correctness arising from the settlement and certification of a bill of exceptions is not rebutted it is conclusive.—*State v. Tate*, 343.

**BILLS AND NOTES.**

**Mortgage foreclosure—Fraud**,—see Fraud, 3-6.

**Injunction *pendente lite* to restrain transfer of promissory notes**,—see Injunction, 1, 2, 3.

**Promissory Notes—Accommodation Maker—Liability.**

1. Under the negotiable instruments law (secs. 5844, 5877, Rev. Codes), an accommodation maker of a promissory note is primarily liable, and is not discharged by an extension of time given his comaker; the fact that plaintiff—a holder for value—knew that defendant was an accommodation maker did not change the rule.—*First State Bank of Hilger v. Lang*, 146.

**Payable in Money.**

2. A promissory note legally imports a promise to pay in money only.—*First State Bank of Hilger v. Lang*, 146.

**Renewal—Effect—Banks and Banking.**

3. In the absence of an agreement to the contrary, the effect of the renewal of a promissory note is to extend the time of payment, not to discharge the obligation, the act of the cashier of the payee bank in stamping "paid" upon the old note not changing the rule.—*First State Bank of Hilger v. Lang*, 146.

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**Same—Ratification of Act of Cashier—Availability of Defense.**

7. While knowledge of the affairs of a bank by its directors will be presumed in favor of an innocent third party where ratification of an unauthorized act of its cashier is alleged, no such presumption is indulged in favor of its president, who is also a director and who seeks to profit by such act, resulting in his release from liability on a promissory note signed by him as an accommodation maker.—First State Bank of Hilger v. Lang, 146.

**Same.**

8. Since the effect of an action against the maker of a note on which defendant bank president was jointly liable was to lessen the latter's liability by recovering what could be recovered from his comaker, defendant was not in position to assert that by bringing that action the bank had ratified the unauthorized conduct of its cashier (par. 7, above) and thus discharged him from further liability.—First State Bank of Hilger v. Lang, 146.

**Same—Laches.**

9. Where an action on a note is brought within the period of the statute of limitations, the defense of laches has no merit.—First State Bank of Hilger v. Lang, 146.

**Same—Banks—Authority of Cashier—Question of Law—Directing Verdict.**

10. Where the evidence touching the actual and ostensible power of a bank cashier to release security was undisputed, the question of his authority in the premises was one of law and the trial court could properly direct a verdict.—First State Bank of Hilger v. Lang, 146.

**Same—Presumptions.**

11. Where defendant gave his promissory notes to plaintiff at a time when, as alleged in his counterclaim, the latter was indebted to him in a substantial sum, defendant had the burden of rebutting the presumption that they would not have been executed if plaintiff had been indebted to him.—J. I. Case Threshing Machine Co. v. Hamilton, 276.

**Same—Defenses—Fraud—Cancellation—Burden of Proof.**

12. In an action on a promissory note, the cancellation of which was sought by defendant for fraud in its execution, upon proof by plaintiff bank that it had purchased the note before maturity and for value, the burden was upon defendant to show that fraud had entered into the stock subscription in part payment of which the note had been given, and that plaintiff bank had knowledge thereof when it bought the paper.—Citizens' State Bank v. Snelling, 476.

Same—Evidence—Statements Made After Transfer—Irrelevancy.

13. Statements of officers of a bank suing on a promissory note, made months after its purchase for value and having no bearing upon the dealings between the maker and the payee's agent which culminated in the giving of the note, could not affect its transfer to plaintiff bank.—*Citizens' State Bank v. Snelling*, 476.

Same—What not Actionable Fraud.

14. Statements in the nature of prophecies made by a promoter of stock, to the effect that profits of the corporation proposed to be formed would be large, that all but the first payment on the subscription price would be taken care of by the profits, that a large number of bankers had subscribed and would become active agents for the company, *etc.*, held insufficient to charge actionable fraud.—*Citizens' State Bank v. Snelling*, 476.

Same—Oral Modification—Evidence.

15. An unexecuted oral agreement the effect of which was to alter the terms of a promissory note by extending the time of payment and changing the amount due, constituted no defense, under section 5067, Revised Codes, to the enforcement of the note; hence evidence tending to prove the agreement was improperly admitted.—*Lish v. Martin*, 582.

Same—Counterclaim—Unjustifiable Verdict.

16. Where the amount due plaintiff on a promissory note admittedly exceeded defendant's counterclaim by \$102.50, a verdict in favor of defendant was unwarranted.—*Lish v. Martin*, 582.

#### BLOCK-SIGNAL SYSTEMS.

Taxation,—see Taxation, 8.

#### BOARD OF COUNTY COMMISSIONERS.

See Counties, 1, 2.

#### BONDS.

Public—Subject to Taxation,—see Taxation, 9-22.

#### BOUNDARIES.

Ditches—Ownership—Change of Boundary Lines.

1. Title to a ditch constructed on what was unsurveyed public land at the time of its construction, was not affected by a change in boundary lines wrought by the official survey, causing a portion of the ditch to fall within the lines of an adjacent owner.—*Lowry v. Carrier*, 392.

#### BRIEFS.

Waiver of assignment of error,—see Appeal and Error, 3.

#### BROKERS.

See Principal and Agent, 3-7; Real Property, 4, 5.

#### BURDEN OF PROOF.

Violation of official duty,—see Executors and Administrators, 5.

Cities and Towns—Powers.

1. Since a city exercises only limited delegated authority, anyone claiming the benefit of a city's act has the burden of showing that it acted within the scope of its authority.—*State ex rel. City of Billings v. Billings Gas Co.*, 102.

**Personal Injuries—Master and Servant—Insufficient Number of Employees.**

2. In an action by a laborer against his employer for negligent failure to detail a sufficient number of men to move a heavy plate, resulting in its fall and plaintiff's injury, the burden was upon the latter to show that the negligence alleged was the proximate cause of his injury.—Markinovich v. Northern Pac. Ry. Co., 139.

**Banks—Directors—Dealing With Corporation—Good Faith.**

3. Whenever it appears that a director has been dealing with his corporation, the burden is on him to show that his dealings have been fair and honest and that it has not suffered from his acts.—First State Bank of Hilger v. Lang, 146.

**Deeds—Want of Consideration.**

4. A deed to land furnishes presumptive evidence of a consideration, and the burden of showing want of consideration sufficient to support it is upon him who seeks to invalidate it or avoid its effect. Lee v. Laughery, 238.

**Taxation—Exemptions—State and County Bonds.**

5. In an action to recover taxes on state and county bonds paid under protest as improperly assessed, the plaintiff had the burden of showing that the state cannot tax its public securities when held in private ownership within the state, or that such bonds are not "property" within the meaning of that term as employed in Article XII of the Constitution and the revenue laws of the state, or that the bonds are exempt from taxation.—Cruise v. Fischl, 258.

**Same.**

6. An exemption from taxation is a release from the obligation to support the government which affords protection to the taxpayer, and he who seeks immunity has the burden of showing that the property claimed to be exempt belongs to a class which is specifically exempt.—Cruise v. Fischl, 258.

**Commissions.**

7. Where commissions on sales of machinery were claimed under a dealer's contract which provided that commissions were not to become due and payable until the purchase price should have been paid, the burden was upon the party claiming them to show payment.—J. I. Case Threshing Machine Co. v. Hamilton, 276.

**Personal Injuries—Federal Employers' Liability Act—Interstate Commerce.**

8. In order to make out a *prima facie* case, where recovery for a personal injury is sought under the federal Employers' Liability Act, plaintiff has the burden of proving that at the time of the accident he was employed in interstate commerce.—Matti v. Chicago, Milwaukee & St. Paul Ry. Co., 280.

**Quantum Meruit—Full Performance.**

9. Where a purchaser of land, unable to carry out the provisions of his contract, had entered into a special agreement with the vendor, under which he was required to do certain work as well as to surrender the original contract and possession of the land, he was required to show, as a condition precedent to his right to recover on a *quantum meruit*, that he had fully performed in all three particulars. De Young v. Benepe, 306.

**Change of Venue.**

10. The burden of showing that a place other than the residence of plaintiff was agreed upon as the place where payment should be made under a contract of indemnity, was upon defendant company on its motion for a change of venue to the county of its residence.—State ex rel. Western A. & I. Co. v. District Court, 330.

**Building Contracts—Substantial Performance.**

11. Plaintiff has the burden of proving the expense of supplying omissions in the performance of a building contract he sues upon, if he alleges substantial performance, or where he alleges full performance and his evidence establishes substantial performance only.—*Roberts v. Sinnott*, 369.

**Specific Performance.**

12. One who seeks specific performance of a contract of sale made by a receiver in a foreclosure suit, has the burden of showing that the contract was just and fair in all respects.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**Office and Officers—Compensation.**

13. Emoluments follow the legal title to an office; hence one who seeks to enforce payment of compensation attached to an office has the burden of showing that he is in right as well as in fact the officer he claims to be.—*State ex rel. Boulware v. Porter*, 471.

**Promissory Notes—Fraud—Cancellation.**

14. In an action on a promissory note, the cancellation of which was sought by defendant for fraud in its execution upon proof by plaintiff bank that it had purchased the note before maturity and for value, the burden was upon defendant to show that fraud had entered into the stock subscription in part payment of which the note had been given, and that plaintiff bank had knowledge thereof when it bought the paper.—*Citizens' State Bank v. Snelling*, 476.

**Legislature may Establish Rules.**

15. The legislature may establish rules relating to the burden of proof, provided they are reasonable.—*Shea v. North Butte Mining Co.*, 522.

**BURGLARY.**

See Criminal Law, 49.

**CANCELLATION OF INSTRUMENTS.**

Burden of proof,—see Bills and Notes, 12.

**CAVEAT EMPTOR.**

See Judicial Sales, 2.

**CERTIORARI.**

See Judgments, 3-6, 10.

Does not lie, when,—see Intoxicating Liquors, 15, 16.

**CHANGE OF VENUE.**

See Venue, 1-5.

**CHATTEL MORTGAGES.**

See Mortgages, 1-6.

**CIRCUMSTANTIAL EVIDENCE.**

See Evidence, 10, 24, 25.

**CITIES AND TOWNS.**

See, also, Nuisances.

Police officers—Unlawful removal,—see Mandamus, 2.

**Gas—"Franchise."**

1. The right granted to a company under ordinance to use streets for laying mains and supplying inhabitants with gas is a "franchise."—*State ex rel. City of Billings v. Billings Gas Co.*, 102.

**Same—Acceptance of Franchise—Effect.**

2. Acceptance of a franchise which contains terms constitutes a contract between a city and a gas company if the city had authority to make such contract.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Public Utility Rates—Right to Fix.**

3. There is a well-defined distinction between authority of a city to regulate public utility rates from time to time, and authority to fix rates by contract for a definite period.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Right to Alter.**

4. Where a city has entered into a binding contract with a public utility, fixing rates for a definite period, it surrenders for the duration of the contract its governmental function of rate regulation so far as altering contract rates is concerned.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Powers—How Determined.**

5. A city has only such authority as is conferred upon it by express legislative declaration, or by necessary implication, and any doubt as to the existence of a particular power will be resolved against a city, and right to exercise such power denied.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Powers—Burden of Proof.**

6. Since a city exercises only limited delegated authority, anyone claiming the benefit of a city's act has the burden of showing that it acted within the scope of its authority.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Granting Franchise—Approval of Electors.**

7. A city cannot grant a franchise for supplying inhabitants with illuminating gas until the application for it has first been submitted to and approved by its qualified electors.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Franchise Contract—Unreasonable Terms—Effect.**

8. A city cannot bind its inhabitants by a contract unreasonable in its terms.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Public Utility Rates—Regulation—Presumptions.**

9. Rate regulation of public utilities is a legislative function of the state, and since the effect of a grant to a city to enter into a contract with a public utility for specific rates for a given period is to extinguish *pro tanto* a governmental power of first importance, the courts will not indulge the presumption that such a surrender of power has been made, but the legislative intention must be expressed in clear and unmistakable language or necessarily implied from the powers expressly granted, before it can be held that the state has precluded itself from the function of rate regulation and control.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Public Utility Rates—State Regulation.**

10. Under section 3259, subdivisions 63 and 73, Revised Codes, a city may contract for rates with a public utility, subject, however, to the paramount authority of the state (see par. 9 above) to exercise its power in the premises whenever it chooses to do so.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Regulation of Gas Rates—Constitution—Impairing Obligation of Contracts.**

11. Inasmuch as a franchise contract made in 1912 between a city and a gas company must be presumed to have been entered into with knowledge that the state could thereafter enact legislation toward exercising the power of rate regulation reposed in it, and



thus change the rates fixed by the contract (see paragraphs 9 and 10 above), Chapter 52, Laws of 1913, creating a public utility commission with power to regulate rates, *etc.*, is not open to attack on the ground that it impairs the obligation of the contract made the year before.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Regulation of Rates—Statutory Construction.**

12. *Held*, that the concluding sentence of section 11 of the Act of 1913, to-wit: "This, however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts," refers to the sentence immediately preceding—which forbids rebates, concessions, *etc.*, and was not intended to except from the operation of the Act rate contracts made between cities and public utilities prior to its passage.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Same—Gas Rates—Filing With Utilities Commission—Effect.**

13. The rates required by section 11 of the Act establishing the Public Utilities Commission (Chap. 52, Act of 1913) to be filed by public utilities with the commission as in force at the time of filing, become the legal rates without affirmative action by the commission, and remain so until changed in the manner provided by the Act.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Special Improvements—Statute—Constitution.**

14. *Held*, that section 13, Laws of 1913, which casts upon the owner of city or town realty embraced within the limits of a proposed special improvement district the burden of ascertaining the amount of damage likely to ensue to the property by reason of its creation, and making claim for the amount within a specified time or be debarred thereafter from doing so, is violative of section 14, Article III, Constitution, which forbids the taking or injuring of private property for a public use until compensation is *first* made or tendered.—Eby v. City of Lewistown, 113.

**Same—Changing Street Grade—Measure of Damages—Evidence.**

15. Evidence to show the cost of filling plaintiff's lots and raising his buildings to grade, and the market value of the property before and after making the improvement, was competent and material in an action to recover damages occasioned by the change.—Eby v. City of Lewistown, 113.

**Same—Pleading—Evidence—Admissibility.**

16. Under allegations of the complaint that plaintiff's property had been permanently injured by change in street grade, rendered inaccessible and undesirable for the purposes for which used, necessitating large expenditures in filling and adjusting the lots to grade, *etc.*, and defendant's denial of any damage whatever, the latter was entitled to introduce evidence tending to show that the property had not been injured or that the damage was less than claimed by plaintiff.—Eby v. City of Lewistown, 113.

**Same—Notice—Publication—Sufficiency.**

17. Publication of a notice of intention to create a special improvement district which contained the proper reference to time and place for hearing objections to its final adoption, *held* to have been in substantial compliance with section 3397, Revised Codes.—Allen v. City of Butte, 205.

**Same—Statutes—Assessments—Payment.**

18. *Held*, that the provisions of section 3385, Revised Codes, referring to special improvements to be paid for in cash upon its completion, and those of section 3396, under which payment is to be made upon the installment plan covering a period of years, are not inconsistent.—Allen v. City of Butte, 205.

**Same—Assessment—Payment.**

19. Where the city council adopts the plan of payment provided in section 3396, Revised Codes, the entire cost of the special improvement may be charged to the property.—*Allen v. City of Butte*, 205.

**Same—Initiative and Referendum—When Inapplicable.**

20. The initiative and referendum apply only to matters of general legislation, in which all qualified electors of a city are interested, not to local matters, such as the creation of a special improvement district, in which only its inhabitants or property owners are interested.—*Allen v. City of Butte*, 205.

**Same—Jurisdiction to Order Improvement.**

21. Since section 3373, Revised Codes, does not provide the manner in which the city council shall make manifest its decision that the construction of a sewer was necessary for sanitary purposes, the question of jurisdiction in the council to proceed with its construction is not presented where plaintiff does not allege in his complaint that it did not, by a vote of the majority of its members, make such decision.—*Allen v. City of Butte*, 205.

**Same—Assessments—Lien—Damages.**

22. Where the city council had acquired jurisdiction to order a special improvement and levy the assessment to pay for it, the assessment became a lien against the property benefited by it from the date the assessment became due, not affected by the circumstance that plaintiffs had recovered judgments against the city for damages caused by the improvement.—*Allen v. City of Butte*, 205.

**Streets—Easement by Prescription.**

23. The mere use of land as a public street or highway for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, does not vest the city with title by prescription to an easement in it.—*Barnard Realty Co. v. City of Butte*, 384.

**Same—Streets—Easement by Prescription—How Acquired.**

24. A city cannot acquire a prescriptive right to an easement in land for street purposes, unless public travel has pursued a definite, fixed course over it for the statutory period.—*Barnard Realty Co. v. City of Butte*, 384.

**Same—Acquisition of Easement—Quantum of Proof.**

25. The assertion of an easement in land for street purposes based upon adverse user for the statutory period, must be supported by clear and convincing proof.—*Barnard Realty Co. v. City of Butte*, 384.

**Special Improvement Districts—Creation—Prerequisites.**

26. The successive steps necessary to be taken by a city council in the creation of a special improvement district under Chapter 89, Laws of 1913, as amended by Chapter 142, Laws of 1915, are: (1) The adoption of a resolution of intention; (2) the service of the required notice; (3) a hearing and determination against protests; and (4) the passage of a resolution creating the district, the first three of which are jurisdictional; failure of the council to take any one of these is fatal to the proceedings.—*Johnston v. City of Hardin*, 574.

**Same—City Council—Powers—Presumptions.**

27. The city council in proceedings looking to the creation of special improvement districts has only such powers as are conferred upon it by Chapter 89, Laws of 1913, and Chapter 142, Laws of 1915, above, in that behalf, and therefore no presumption in favor of its jurisdiction can be indulged.—*Johnston v. City of Hardin*, 574.

**Same—Notice of Intention.**

28. Unless waived, service of the notice of the city council's intention to create a special improvement district upon the interested property owner, provided for by section 3 of Chapter 89, Laws of 1913, is indispensable to the validity of the proceedings.—*Johnston v. City of Hardin*, 574.

**Same—Notice of Intention—Description of Boundaries of District.**

29. The notice mentioned above (paragraph 28) must refer the interested property owner to the particular resolution of intention to create a proposed district for a description of its boundaries, the resolution thus in effect being made a part of the notice.—*Johnston v. City of Hardin*, 574.

**Same—Erroneous Description of Boundaries—Effect on Jurisdiction of Council.**

30. Where a resolution of intention to create a special improvement district described the boundaries of an entirely different district from that referred to in the notice served upon the owner of property affected, the city council did not acquire jurisdiction to proceed with the improvement.—*Johnston v. City of Hardin*, 574.

**Same—Notice—Caption not Part of.**

31. The caption of a notice is no part of the notice itself, and cannot be looked to to supply any deficiency in the notice.—*Johnston v. City of Hardin*, 574.

**Same—Erroneous Notice—Actual Knowledge—Inferences Insufficient.**

32. In the absence of the statutory notice of the city council's intention to create a special improvement district, plaintiff property owner was not called upon to act, an inference deducible from his complaint that he had actual knowledge that his property was to be included in the proposed district, being insufficient.—*Johnston v. City of Hardin*, 574.

**COLLATERAL ATTACK.**

When judgment not subject to,—see *Judgments*, 15.

**COMMISSIONS.**

Brokers,—see *Principal and Agent*, 3-7; *Real Property*, 4, 5.

**COMMON LAW.**

Defenses—Legislature may abolish,—see *Personal Injuries*, 14.

**COMPENSATION.**

See *Office and Officers*; *Legislature*.

**CONCLUSIONS.**

See *Evidence*, 21.

**CONDITIONS PRECEDENT.**

Pleading,—see *Pleading and Practice*, 3.

**CONSIDERATION.**

Want of—Burden of proof,—see *Real Property*, 10.

## CONSTITUTION.

**Constitutionality of Workmen's Compensation Law,—see Workmen's Compensation.**

**License Fees—Insurance Corporations—Discrimination.**

1. Chapter 79, Laws of 1917, *held* not unconstitutional because of alleged discrimination between corporations whose business is and those whose business is not wholly within this state, such discrimination being necessary to attain reasonable equality of burdens between the two.—*Equitable Life Assurance Co. v. Hart*, 76.

**Teachers' Pensions—Statute—Validity.**

2. *Held*, that Chapter 95, Laws of 1915, providing for teachers' pensions, is not invalid as in contravention of sections 3 and 23 of Article III; section 26, Article V, and section 11, Article XII, of the state Constitution, nor as offending against the clauses of the federal Constitution prohibiting the taking of property without due process of law and denying the equal protection of the laws (Fifth and Fourteenth Amendments, U. S. Const.).—*Trumper v. School District No. 55*, 70.

**Cities and Towns—Regulation of Gas Rates—Impairing Obligation of Contracts.**

3. Chapter 52, Laws of 1913, creating a public utility commission with power to regulate rates, *etc.*, *held* not open to attack on the ground that it impairs the obligation of a contract between a city and a gas company.—*State ex rel. City of Billings v. Billings Gas Co.*, 102.

**Cities and Towns—Special Improvements—Statute—Invalidity.**

4. *Held*, that section 13, Laws of 1913, which casts upon the owner of city or town realty embraced within the limits of a proposed special improvement district the burden of ascertaining the amount of damage likely to ensue to the property by reason of its creation, and making claim for the amount within a specified time or be debarred thereafter from doing so, is violative of section 14, Article III, Constitution, which forbids the taking or injuring of private property for a public use until compensation is *first* made or tendered.—*Eby v. City of Lewistown*, 113.

**Nature of Instrument.**

5. The state Constitution was by its framers intended to be a live instrument, adaptable to the progress and changing conditions of men and affairs.—*Chicago, Mil. & St. P. Ry. Co. v. Murray*, 162.

**Railroads—Electrification System—Transmission Line—By Whom Taxable.**

6. *Held*, that the transmission line by means of which electric current after having been transformed is carried to trolley wires, and owned and used by a transcontinental railway company in connection with the propulsion of its trains through electric motors, is no part of the roadbed, roadway, franchise, rails or rolling-stock, enumerated in section 16, Article XII, of the Constitution, as assessable by the state board of equalization, and is therefore properly assessable by the assessor of the county in which it is found.—*Chicago, Mil. & St. P. Ry. Co. v. Murray*, 162.

**Nature of Instrument—Authority of Legislature.**

7. Since the state Constitution is not a grant of authority but a limitation upon the powers of government, the legislature exercises inherent, not delegated, authority.—*Cruse v. Fischl*, 258.

**Construction—Rule.**

8. Whenever the language of a provision of the Constitution is plain, simple, direct and unambiguous, it does not require construction—it construes itself.—*Cruse v. Fischl*, 258.

**Taxation—Exemptions—Constitution—Self-executing Provisions.**

9. The provision of section 2, Article XII, of the state Constitution, declaring that the property of the United States, the state, counties, cities, towns, school districts, municipal corporations and public libraries shall be exempt, is self-executing, and denies the legislative authority to tax any property of that class.—*Cruise v. Fischl*, 258.

**Same—Exemptions—Power of Legislature.**

10. Under section 2, Article XII, of the state Constitution, the legislature may extend (and has extended) exemption from taxation to property of a *quasi*-public character, i. e., property used exclusively for agricultural and horticultural societies, educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, but cannot extend it to any other.—*Cruise v. Fischl*, 258.

**Access to Courts—Meaning of Guaranty.**

11. Under section 6, Article III, of the Constitution, courts must be accessible to all persons alike, without discrimination, at the time or times and the place or places appointed for their sitting, and afford a speedy remedy for every injury which the law recognizes or declares to be actionable.—*Shea v. North-Butte Mining Co.*, 522.

**“Judicial Power”—Definition.**

12. “Judicial power,” within the meaning of section 1, Article VIII, of the Constitution, is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision.—*Shea v. North-Butte Mining Co.*, 522.

**Workmen's Compensation—Industrial Accident Board—State Auditor—Holding Two Offices.**

13. The fact that the state auditor is a member of the Industrial Accident Board does not render the Compensation Act unconstitutional on the ground that he thus holds two offices, since the only limitation upon the legislature in imposing duties upon that officer, under section 1, Article IV, of the Constitution, prohibits the imposition of duties appertaining to the legislative or judicial—not the executive—departments of government.—*Shea v. North-Butte Mining Co.*, 522.

CONSTITUTION OF MONTANA.

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## CONSTRUCTIVE NOTICE.

When recordation not,—see Real Property, 6.

## CONTRACTS.

See, also, Brokers; Fraud; Specific Performance.

Agency contract—Commissions,—see Principal and Agent, 4-7.

Options,—see Real Property, 1-3.

Oral modification,—see Bills and Notes, 15.

Performance—Place of payment,—see Payment, 1; Venue, 1-5.

Public contracts,—see Cities and Towns, 1-13.

Conditions Precedent—Pleading.

1. In declaring upon a contract containing conditions precedent, a party may, under section 6572, Revised Codes, allege generally that he has performed all the conditions on his part, provided he couch the allegation in the terms of the statute or in terms equivalent thereto.—*Enterprise Sheet Metal Works v. Schendel*, 42.

Rescission—Fraud—Damage—Complaint—Sufficiency.

2. To state a cause of action for rescission of a contract for fraud, plaintiff need not allege that he suffered pecuniary loss, the statement that he suffered damage or injury being sufficient.—*Stillwell v. Rankin*, 130.

Same.

3. Allegations that plaintiff was induced by defendant's fraudulent representations to assume obligations which otherwise he would not have assumed and to purchase property he would not have bought but for such representations, were sufficient to disclose damage within the meaning of paragraph 1 above.—*Stillwell v. Rankin*, 130.

Same—Fraud—Material Facts.

4. To constitute actionable fraud, the representations relied upon for rescission of a contract must relate to material facts.—*Stillwell v. Rankin*, 130.

Same—What may Constitute "Material Facts."

5. Representations made to a stockholder in a company by a broker that 100 shares of its capital stock had been turned back into its treasury by a subscriber unable to pay therefor and soliciting plaintiff to buy it "to help the company out," held to have related to a material matter within the meaning of section 4978, Revised Codes, defining fraud.—*Stillwell v. Rankin*, 130.

Same—Promissory Notes—Transfer—Injunction *Pendente Lite*—Evidence.

6. The fact that defendant's evidence contradicted the allegations of the complaint, which was verified positively and thus had the effect of an affidavit, did not deprive the district court of power to grant an injunction restraining defendant from transferring promissory notes pending suit for their cancellation for fraud.—*Stillwell v. Rankin*, 130.

Lands—Contracts of Sale—Breach by Purchaser—Effect.

7. Where the vendor of land had exercised his option reserved to him in a contract of sale of land, by ousting the vendee because of failure to make payments as stipulated, the latter was relieved from further payment of taxes, interest, etc., and his refusal to do so could not thereafter be made the basis of an action by the vendor. *De Young v. Benepe*, 306.

**Building Contracts—Extra Work—Oral Agreement—Modifying Written Contract.**

8. Notwithstanding a provision in a building contract that no charges for extra work or for change of material would be allowed unless in writing and accepted, the parties to such a contract may make subsequent independent oral agreements, which, when executed, have the effect of modifying the original contract.—*Roberts v. Sinnott*, 369.

**Same—Substantial Performance—Burden of Proof.**

9. Plaintiff has the burden of proving the expense of supplying omissions in the performance of a building contract he sues upon, if he alleges substantial performance, or where he alleges full performance and his evidence establishes substantial performance only.—*Roberts v. Sinnott*, 369.

**Same—Substantial Performance—Effect.**

10. Where plaintiff pleads and tenders evidence to prove complete performance, he will not be dismissed from court merely because the evidence in its entirety warrants a finding of substantial performance only, if there is evidence offered by either party from which the cost of supplying the omissions can be determined.—*Roberts v. Sinnott*, 369.

**Same—Substantial Performance—Jury Question.**

11. Whether plaintiff substantially performed a building contract was a question for determination by the jury.—*Roberts v. Sinnott*, 369.

**Same—Defective Work—Compliance With Plans—Estoppel.**

12. Where the roof on a dwelling was constructed by plaintiff according to plans which were satisfactory to defendant, the latter could not claim damages because it leaked.—*Roberts v. Sinnott*, 369.

**Same—Remedying Defect—Evidence—Admissibility.**

13. In the absence of evidence that the reasonable value of a new roof covering did not exceed a covering laid by plaintiff according to plans and specifications, evidence as to the amount paid by defendant for the new work was properly excluded.—*Roberts v. Sinnott*, 369.

**Varying Terms—Evidence—Rule—Exception.**

14. The rule declared by section 7873, Revised Codes, that in a controversy between the parties to a written contract or their privies, parol evidence cannot be introduced to vary, enlarge or contradict its terms, *etc.*, has no application in a controversy between a party to the contract and a stranger.—*Read v. Lewis and Clark County*, 412.

**CONTRIBUTORY NEGLIGENCE.**

See *Personal Injuries*.

**CONVERSION.**

Breach of trust,—see *Trusts*, 1.

Of property of intestate—Right of action in heir,—see *Descent and Distribution*, 3.

**COPIES.**

Of entries in bank books—Inadmissibility,—see *Evidence*, 17.

**CORPORATIONS.**

See, also, *Banks and Banking*, 2-12.

License fees payable by,—see *Taxation*, 1-5.

Domestic—Residence,—see *Venue*, 3.

**Stock Subscriptions—Payment—Implied Condition.**

1. When a subscription is made to the capital stock of a corporation the amount of which is specified in the charter, articles of incorporation, or in the contract of subscription, and there is nothing disclosing a contrary intention, the subscription is made upon the implied condition that the whole amount shall be subscribed before the subscriber may be lawfully called on to pay, except for the preliminary expenses.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Unpaid Stock Subscriptions—Action to Recover—Complaint.**

2. The above rule not having been modified by statute in this state, the complaint in an action by a corporation to recover an unpaid stock subscription is fatally defective if it does not disclose that all the capital stock has been subscribed.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Same—Complaint—Insufficiency.**

3. The allegation that plaintiff was duly incorporated under the laws of the state by the subscribers to the subscription contract in pursuance of the terms thereof was not a sufficient averment that all the conditions of the contract had been fulfilled, but meant only that the corporation had gained a legal status to commence business if all the stock had been subscribed, or, if not, to solicit subscribers or sell shares.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Same—Payment—Rule—Modification.**

4. The settled rule of law that a subscriber to the capital stock of a corporation cannot be compelled to pay unless the whole amount shall have been subscribed is susceptible of annulment or modification by express provision of statute only.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Unpaid Stock Subscriptions—Waiver.**

5. Since a "waiver" is the intentional relinquishment of a known right, acceptance of corporate stock subscribed for without knowledge that all of the stock had not been taken was not a waiver of the condition precedent requiring subscription of all the stock before liability attached.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Same—Implied Waiver—What Constitutes.**

6. While a waiver may be implied by the conduct of the party against whom it is alleged, the circumstances must be such as to furnish the basis for an inference of knowledge and intention to forego the right which he might have asserted.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Same—Recovery—Rule—Modification.**

7. *Held*, that the contention that section 3825, Revised Codes, as amended (Laws 1909, p. 148), section 1, Chapter 94, Laws 1909, p. 124; sections 3818 and 3889, Revised Codes, as amended (Laws 1915, Chap. 88); and sections 3829, 3840, 3867 and 3897, Revised Codes, have in effect modified the general rule requiring that the whole amount of the capital stock of a corporation must be subscribed before a subscriber may be called upon to pay has no merit, and that the general rule, therefore, is controlling in this state.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Foreign Corporations—Advantages Over Domestic Corporations.**

8. Foreign corporations cannot complain that they are not given advantages over those created by authority of this state.—*Equitable Life Assurance Co. v. Hart*, 76.



COSTS.

Improper charge against special administrator,—see Executors and Administrators, 11-13.

When disallowance proper,—see Executors and Administrators, 8.

COUNTERCLAIMS.

Promissory Notes—Unjustifiable Verdict.

1. Where the amount due plaintiff on a promissory note admittedly exceeded defendant's counterclaim by \$102.50, a verdict in favor of defendant was unwarranted.—*Lish v. Martin*, 582.

COUNTIES.

Removal of County Seat—Petition—Sufficiency—Test.

1. Held, under section 2852, Revised Codes that the board of county commissioners is limited in its investigation of the sufficiency of a petition for the removal of the county seat to a comparison of the names appearing thereon with the poll-books to ascertain whether the signers are voters, and with the assessment-roll, whether they are taxpayers, and may not, therefore, eliminate from the petition names of persons who have ceased to be legal voters or taxpayers.—*Ainsworth v. McKay*, 270.

Board of County Commissioners—Powers.

2. The board of county commissioners possesses only such authority as is conferred upon it expressly, and such additional authority as is necessarily implied from that which is granted expressly.—*Ainsworth v. McKay*, 270.

COUNTY ATTORNEYS.

Criminal law—Trial—Opening statement,—see Criminal Law, 33.

Remarks during trial deemed objectionable,—see Appeal and Error, 3; Criminal Law, 40.

COUNTY BONDS.

Subject to taxation,—see Taxation, 9-22.

COUNTY CLERKS.

Filing nominations to office,—see Elections, 2-5.

COUNTY HIGH SCHOOLS.

Special elections,—see Elections, 1.

CREDITS.

Solvent,—see Taxation, 23.

CRIMINAL LAW.

See, also, Intoxicating Liquors, 1-10; New Trial, 11-14; Trading Stamp Act.

Murder—Self-defense—Evidence—Admissibility.

1. Evidence of hostile encounters between defendant and the deceased on the evening of and previous to the killing for which defendant was being tried was admissible to ascertain the state of mind of the parties at the time and thus to determine who was the aggressor.—*State v. Inich*, 1.

**Same—Conflicting Evidence—Judgment—Review.**

2. The verdict of the jury in a capital case based on conflicting testimony and approved by an order overruling a motion for a new trial will not be disturbed on appeal.—State v. Inich, 1.

**Same—Trial—Exceptions—Review.**

3. Rulings of the court made during the trial of a criminal cause to which no exceptions were reserved are not reviewable on appeal. State v. Inich, 1.

**Same—Appeal—Exceptions—Briefs—Assignments of Error—Waiver.**

4. Assignment of error based upon alleged objectionable remarks made during trial by the county attorney but not excepted to nor argued in appellant's brief will be deemed waived.—State v. Inich, 1.

**Same—Trial—Interpreters—Discretion.**

5. Determination of the question whether an interpreter is necessary for a particular witness lies within the discretion of the trial court, and its conclusion is not subject to review except for a manifest and gross abuse of discretion.—State v. Inich, 1.

**Same—Interpreters—Refusal to Appoint—When not Error.**

6. Abuse of discretion in appointing an interpreter in a criminal case will not justify setting aside a conviction, unless defendant apparently was prejudiced thereby.—State v. Inich, 1.

**Same.**

7. Where a foreign-born witness understood and spoke with reasonable ease the English language of the street and that used in ordinary business but encountered difficulty and embarrassment when subjected to examination on the witness-stand, the appointment of an interpreter held not to have been a manifest or gross abuse of discretion.—State v. Inich, 1.

**Same—Trial—Cross-examination—Rule.**

8. Cross-examination must be limited to matters about which the witness has testified in his examination in chief.—State v. Inich, 1.

**Same—Trial—Evidence—Remarks of Judge.**

9. A trial judge may state his reasons for his rulings in admitting and excluding evidence, so long as he refrains from expressing an opinion as to its weight, leaving this to the judgment of the jury.—State v. Inich, 1.

**Same—Trial—Remarks by Judge—Harmless Error.**

10. Where the trial court in its instructions admonished the jury to disregard any comments or remarks made by it in admitting or excluding evidence, alleged error in this regard was rendered harmless. State v. Inich, 1.

**Same—State's Witnesses—Refusal to Call.**

11. Refusal of the court to require the state to call and examine an eye-witness to the crime whose name was indorsed on the information held proper.—State v. Inich, 1.

**Same—Defendant as Witness—Cross-examination.**

12. Defendant having chosen to become a witness in his own behalf, became subject to cross-examination as to admissions made by him, to the same extent as any other witness.—State v. Inich, 1.

**Same—Cross-examination of Defendant—Harmless Error.**

13. Requiring defendant to answer on his cross-examination as to immaterial matters was harmless where they had been gone into fully in the examination of other witnesses.—State v. Inich, 1.

**Same—Witnesses—Repetition of Questions—Harmless Error.**

14. Where a witness had enumerated all the persons present at a shooting, requiring an answer to an inquiry whether he was positive

- that no one else was there resulted in useless repetition but not in prejudicial error.—State v. Inich, 1.
- Same—Instruction as to Guilt or Innocence of Defendant.
15. An instruction that "the whole of your number must agree in finding the defendant guilty or not guilty," *held* not objectionable as denying the jury the liberty of reaching a disagreement.—State v. Inich, 1.
- Same—Insufficient Instruction—Duty of Appellant.
16. Failure of defendant to offer an instruction more specific than one complained of as erroneous bars him from alleging error in the giving of the former.—State v. Inich, 1.
- Same—Self-defense—Requested Instructions—Refusal—When not Error.
17. Where the court had instructed the jury fully on the matter of self-defense, it was not reversible error to refuse requested instructions thereon although the court might properly have given them.—State v. Inich, 1.
- Same—Jury Question—Motive—Youth of Defendant.
18. In a prosecution for murder, defendant's youth, the fact that the evidence against him came from persons not above suspicion, and that no motive adequate to a cautious or well-balanced mind was established, were matters for the jury's consideration in the first instance and for that of the trial judge on motion for new trial.—State v. Van Laningham, 17.
- Same—Motive—Proof Unnecessary.
19. The state is not required to show an adequate motive before defendant may be convicted of murder.—State v. Van Laningham, 17.
- Same—Newly Discovered Evidence—Proper Denial of New Trial.
20. Where certain items of alleged newly discovered evidence were cumulative in character, and as to others no satisfactory showing of diligence to discover them before trial was made, the motion for new trial was properly denied.—State v. Van Laningham, 17.
- Same.
21. A declaration, said to have been made after trial, by the former wife of decedent, that "they had got the wrong man," but denied by her in a counter-affidavit, was insufficient to warrant a new trial on the ground of newly discovered evidence, in view of the circumstances under which it was alleged to have been made.—State v. Van Laningham, 17.
- Same.
22. Where the jury knew that one of the state's witnesses was in jail on a felony charge and had been made a cell mate of defendant in order to obtain information, matter urged as newly discovered evidence to the effect that the witness had agreed to plead guilty and was thereafter discharged without trial went to his credibility, which had been thoroughly canvassed before the jury, and was insufficient to command a retrial.—State v. Van Laningham, 17.
- Same.
23. A new trial was properly refused where the newly discovered evidence on discovery of which it was based was of such an unsubstantial character as to render a different verdict improbable.—State v. Van Laningham, 17.
- Same—Experiments—Newly Discovered Evidence—Insufficiency.
24. Retrial on the ground of newly discovered evidence touching an experimental horse-back ride from the scene of the murder to defendant's house, *held* properly denied where the conditions under which it was made were dissimilar from those prevailing when defendant was shown to have made it, and where the witness' affi-

davit amounted to an expression of opinion contrary to that given by him at the trial.—State v. Van Laningham, 17.

Same—What not Newly Discovered Evidence.

25. Statements of persons which were known to counsel for defendant before the close of a murder trial did not constitute newly discovered evidence.—State v. Van Laningham, 17.

Grand Larceny—Possession of Stolen Property—Evidence.

26. Possession of property recently stolen is only a strong circumstance, indicating guilt, not alone sufficient to warrant conviction of offense of larceny.—State v. Mullins, 95.

Same—Circumstantial Evidence—When Sufficient.

27. When a conviction is sought upon circumstantial evidence the proof must be such as not only to authorize a belief in the guilt of the accused, but also to exclude every other reasonable hypothesis. State v. Mullins, 95.

Same—Conviction—*Quantum* of Evidence Required.

28. One charged with crime may be convicted only upon evidence establishing his guilt beyond a reasonable doubt, *i. e.*, upon proof such as to logically compel the conclusion that the charge is true.—State v. Mullins, 95.

Same—Evidence—Insufficiency.

29. Evidence held insufficient to warrant conviction of the crime of grand larceny.—State v. Mullins, 95.

Felony—Evidence—Inspection of Papers—Statutes.

30. The provision of section 7138, Revised Codes, that the court may order a litigant to permit his opponent to inspect entries of accounts, papers, *etc.*, in his possession or under his control relating to the merits of the action, refers only to such matters as might be introduced in evidence, and not to *ex parte* statements of a prosecuting witness touching the facts and circumstances surrounding the commission of a crime, reduced to writing by and in possession of the county attorney.—State v. Hall, 182.

Dismissal of Action—Trial—Incomplete Opening Statement.

31. A civil action as well as a criminal prosecution may be dismissed upon the conclusion of the opening statement of counsel, if such statement discloses affirmatively that the plaintiff cannot prevail.—State v. Hall, 182.

Incomplete Opening Statement—Dismissal—Proper Refusal.

32. Refusal to dismiss a criminal action for mere failure of the prosecuting attorney to make mention in his opening statement of the county in which the crime for which defendant was on trial had been committed was proper.—State v. Hall, 182.

Same—Opening Statement—Statute—Directory Provision.

33. The provision of section 9271, Revised Codes, requiring the county attorney to make an opening statement in a prosecution for crime, held directory merely.—State v. Hall, 182.

Same—Admonishing Jury—"Jury."

34. Until the jury in a criminal cause is completed and sworn, it is not a "jury" within the meaning of section 9301, which requires the trial judge to admonish the jury at each adjournment not to form or express an opinion upon the case until final submission to them.—State v. Hall, 182.

Same—Admonishing Jury—Record Imports Verity.

35. The record on appeal in a criminal cause which disclosed that when an adjournment was taken, "the jury was admonished by the court and placed in charge of the sheriff," *etc.*, was sufficient to dis-

close compliance with section 9301, Revised Codes, imported verity and could not be impeached by affidavit.—State v. Hall, 182.

**Admonishing Jury—Curing Error.**

36. Failure of the court to admonish the jury not to form or express an opinion about the merits of the case upon taking an adjournment after the jury had been sworn, was cured by proper admonitions at every subsequent adjournment.—State v. Hall, 182.

**Same—Settlement of Instructions—Not Part of Trial—Presence of Defendant.**

37. The settlement of the instructions being no part of the "trial" within the meaning of section 9233, Revised Codes, requiring the presence of one charged with felony, throughout the trial, his absence during such settlement does not constitute reversible error.—State v. Hall, 182.

**Same—Presence of Defendant—Minutes of Court—Construction.**

38. Minutes of the court construed and *held* to show that defendant was continuously present in court from 3 P. M. of a certain day when the jury was instructed until 12:50 A. M. of the next day when the verdict was returned, contrary to the contention of the appellant that he was not present when the verdict was delivered.—State v. Hall, 182.

**Same—Appeal—Prejudice—Presumptions.**

39. Under section 9415, Revised Codes, prejudice to appellant in a criminal cause cannot be presumed, but must be made to appear, either affirmatively by the record, or by a denial or invasion of some substantial right from which the law imputes prejudice.—State v. Hall, 182.

**Same—Remarks of County Attorney—Prejudice not Shown.**

40. *Held*, under the above rule, that in the absence of the evidence from the record, objectionable remarks made by the county attorney in his closing argument excepted to as beyond the rules of legitimate advocacy were not sufficient to warrant a reversal of the judgment, since the evidence may have pointed so conclusively to defendant's guilt that no prejudice could have resulted from the statements.—State v. Hall, 182.

**Rape—Evidence—Sufficiency.**

41. In a prosecution for rape, the uncorroborated direct testimony of the prosecutrix, if believed, establishes the guilt of defendant.—State v. Tate, 343.

**Same—Verdict of Acquittal—Refusal to Direct—When Proper.**

42. Refusal to direct a verdict of acquittal was proper where the evidence was sufficient, as matter of law, to prove every element necessary to constitute the crime of rape.—State v. Tate, 343.

**Same—Directed Verdict of Acquittal—When Proper.**

43. Under Section 9297, Revised Codes, the district court may, in its discretion, advise, but not direct or compel, the jury to acquit if it deems the evidence to be clearly insufficient in weight to justify a verdict of guilty.—State v. Tate, 343.

**Same—Attorney and Client—Trial—Argument to Jury—Duty of Attorney.**

44. It is the duty of counsel for defendant charged with crime to present the case of his client on argument in the light most favorable to the latter, and to that end to urge upon the jury all inferences from and interpretations of the evidence which are not palpably unwarranted, and so long as he does not misstate the testimony, his privilege in this respect is almost without limit.—State v. Tate, 343.

**Same—Trial—Curtailling Argument to Jury—Prejudicial Error.**

45. Refusal of the court to permit defendant's counsel to comment in his argument to the jury upon statements touching a material fact made by the prosecutrix and her sister, which were contradictory of each other, was prejudicial error, entitling defendant to a new trial. *State v. Tate*, 343.

**Same—Trial—Evidence—Remarks by Court—Invading Province of Jury.**

46. Remarks of the trial judge during argument of defendant's counsel, to the effect that prosecutrix and her sister had not testified to a certain material fact as counsel asserted they had, that no juror was in doubt about that, etc., whereas such testimony had in fact been given, virtually resulted in a withdrawal of their statements from the jury and constituted prejudicial error.—*State v. Tate*, 343.

**Evidence—Suspicious of Guilt Insufficient.**

47. Suspicion however well founded, that defendant is guilty of the crime for the commission of which he is being tried, does not justify a conviction.—*State v. Brower*, 349.

**Same—Circumstantial Evidence—Sufficiency—Rule.**

48. Where circumstantial evidence is relied on to convict of crime, the circumstances proved must be consistent with each other and so clearly justify the conclusions of guilt that they exclude any other rational hypothesis.—*State v. Brower*, 349.

**Same—Burglary—Circumstantial Evidence—Insufficiency.**

49. Evidence, wholly circumstantial in character, held insufficient, under the above rules, to warrant defendant's conviction of the crime of burglary in the night-time.—*State v. Brower*, 349.

**Homicide—When Excusable—Evidence.**

50. To justify a finding that a homicide by shooting was excusable, under section 8299, Revised Codes, where defendant and deceased were strangers, the evidence must show that when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent.—*State v. Kuum*, 436.

**Same—When Unintentional—Evidence.**

51. Where, in a prosecution for homicide, the evidence showed that defendant and deceased were strangers and apparently friendly; that there was no swearing or threatening language used by either; that defendant was much intoxicated at the time; that deceased himself stated that the shot was an accident, and that there was no motive for the shooting, the conclusion follows that the killing was unintentional.—*State v. Kuum*, 426.

**Pointing Loaded Firearm—Assault.**

52. One who points a loaded firearm at another with the purpose of doing the latter an injury or putting him in fear, is guilty of assault; if the pointing of the weapon is accidental and unaccompanied by any unlawful purpose or intent, the act is not a crime.—*State v. Kuum*, 436.

**Homicide—When Excusable—Jury Question.**

53. The question whether defendant while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by section 8299, Revised Codes, to render the killing excusable, was a question for the jury.—*State v. Kuum*, 436.

**Same—Negligent Handling of Firearm—Manslaughter.**

54. The negligent handling of a loaded firearm (or other dangerous agency) causing or contributing to the death of another person is involuntary manslaughter within the meaning of subdivision 2 of section 8295, Revised Codes.—*State v. Kuum*, 436.

**Same—Evidence—Murder in Second Degree—Malice—Presumptions.**

55. Where the state establishes the killing of deceased by defendant, and there is no evidence tending to show circumstances of mitigation or to justify or excuse it, the presumption arises that the killing was prompted by malice and was murder in the second degree; and the burden thereupon is upon defendant to produce evidence sufficient to create a reasonable doubt of the existence of malice, if he would reduce the degree of homicide to manslaughter.—*State v. Kuun*, 436.

**Same—Manslaughter—Presumptions—Malice.**

56. Where the state's evidence tends to show that the homicide committed only amounts to manslaughter, the presumption of malice does not obtain, and the defendant may take advantage of the case as made by the state to reduce the homicide to manslaughter, and refrain from introducing any evidence.—*State v. Kuun*, 436.

**Same—Manslaughter—Defendant's Guilt—Withdrawing Question from Jury.**

57. Where the state's evidence made out only a case of manslaughter it was error to refuse defendant's request to withdraw from jury the question whether the evidence made out a case of murder.—*State v. Kuun*, 436.

**Same—Insanity—Proper Refusal of Instruction.**

58. Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the homicide, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity.—*State v. Kuun*, 436.

**When Defendant Entitled to Retrial.**

59. To secure a new trial a convicted defendant in a criminal case is not required to show an entire absence of evidence of some fact necessary to make out a case; if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a retrial.—*State v. Schoenborn*, 517.

**Penal Statutes—Strict Construction.**

60. A penal statute cannot be extended by implication beyond the legitimate import of the words used therein, so as to embrace cases or acts not clearly described by them.—*State v. Lutey Bros.*, 545.

**CROPS.**

See Mortgages, 1-6.

**CROSS-EXAMINATION.**

See Evidence, 2, 4, 5.

**DAMAGES.**

Compensatory and exemplary,—see Innkeepers, 3-6.

**Alienation of Affections—Punitive Damages—Malice—Jury Question.**

1. Punitive damages may be awarded in an action for the alienation of a husband's affections, even though the evidence furnishes no basis for a finding of malice, since malice may be implied from the conduct of defendant in causing the wrong complained of, its existence being a question for the jury.—*Moelleur v. Moelleur*, 30.

**Option—Joint Holders—Measure of Damages.**

2. In the absence of fraud, the measure of damages in an action by one of two joint holders of an option on land (about to expire) to recover his share of the value of the option upon sale thereof by the other, held under the circumstances to have been one-half the amount

the seller actually received and not the difference between the value of the land at the time and the face of the option.—*Teagarden v. Calkins*, 35.

Streets—Changing Street Grade—Measure of Damages—Evidence.

3. Evidence to show the cost of filling plaintiff's lots and raising his buildings to grade, and the market value of the property before and after making the improvement, was competent and material in an action to recover damages occasioned by the change.—*Eby v. City of Lewis-town*, 113.

Fraud—Damage—Complaint—Sufficiency.

4. To state a cause of action for rescission of a contract for fraud, the allegation that plaintiff suffered damage or injury is sufficient, a statement that he suffered pecuniary loss not being necessary.—*Stillwell v. Rankin*, 130.

#### DECLARATIONS.

New trial—Newly discovered evidence—Insufficiency,—see *Criminal Law*, 21.

Of deceased person—Evidence—Admissibility,—see *Evidence*, 20, 36–39.

#### DEEDS.

Consideration,—see *Real Property*, 10.

Recordation—Notice.—see *Real Property*, 6, 9.

Reservation of minerals—Nuisances—Estoppel,—see *Nuisances*, 5.

#### DEFAULT JUDGMENTS.

Defendant in military service,—see *Judgments*, 16, 17.

#### DEFENSES.

Alienation of affections,—see *Husband and Wife*, 2, 3.

Bankruptcy proceedings,—see *Bankruptcy*, 6, 7.

Contracts—Fraud,—see *Fraud*, 4, 5.

Disbarment,—see *Attorney and Client*, 2.

Nuisances,—see *Nuisances*, 3.

Ratification of unauthorized act of agent,—see *Banks and Banking*, 10, 11.

#### DEMURRER.

Mandamus—Admission of what,—see *Mandamus*, 1.

#### DESCENT AND DISTRIBUTION.

Posthumous Children—Rights and Remedies.

1. For the purpose of defining the civil rights and remedies of a child unborn at the time of the death of its father, it is deemed to have been then living, and therefore enjoys all the rights of inheritance conferred upon a living person.—*Haydon v. Normandin*, 539.

Intestacy—Right of Heirs to Property.

2. Upon the death of an intestate his property passes immediately to his heirs, subject to the control of the probate court for the purpose of administration.—*Haydon v. Normandin*, 539.

Personal Property—Conversion—Right of Action in Heir.

3. Held, that section 6462, Revised Codes, authorizing an heir, who at the time of a wrongful conversion of personal property of his testator or intestate was laboring under a disability, to bring his action



for damages within five years after the cessation of such disability, acts on the remedy only and does not create a new cause of action nor operate retroactively.—*Haydon v. Normandin*, 539.

#### DIRECTORS.

Of bank, see *Banks and Banking*, 2-12.

#### DISBARMENT.

See *Attorney and Client*, 1-4.

#### DISCRETION.

Appointment of interpreter by district court,—see *Criminal Law*, 5-7.

Actions—Dismissal—Want of Prosecution.

1. Whether an action should be dismissed for want of prosecution is a question addressed to the discretion of the trial court.—*Silver v. Eakins*, 210.

New Trial—Review.

2. In no case will the conclusion of the district court in disposing of a motion for a new trial be revised on appeal, except for manifest abuse of its discretion.—*Jones v. Shannon*, 225.

New Trial.

3. *Held*, that the trial court was not guilty of abuse of discretion in granting a new trial for insufficiency of the evidence to justify a verdict.—*J. I. Case Threshing Machine Co. v. Hamilton*, 276.

Specific Performance.

4. Specific performance is not granted as a matter of abstract right, but the application therefor is addressed to the sound, legal discretion of the court, the exercise of which will not be interfered with on appeal in the absence of a clear showing of abuse thereof.—*Interior Securities Co. v. Campbell, Receiver*, 459.

Executors and Administrators—Deceased Persons—Declarations and Admissions—Admissibility.

5. *Held*, that the provision of section 7891, Revised Codes, as amended (*Laws 1913*, p. 57), declaring plaintiff in an action against an executor or administrator an incompetent witness, unless it appears to the court that without his testimony injustice will be done, lodges determination of the question of the admissibility of plaintiff's testimony within the sound discretion of the court, and that refusal of permission to testify was not an abuse of such discretion where there was sufficient evidence to make out a *prima facie* case without plaintiff's testimony.—*Roy v. King's Estate*, 567.

#### DISMISSAL.

Of action—Want of prosecution,—see *Discretion*, 1.

Of appeal—When not subject to dismissal for absence of copy of judgment-roll,—see *Appeal and Error*, 9.

Of criminal action because of incomplete opening statement—Proper refusal,—see *Criminal Law*, 31, 32.

#### DISTRICT COURTS.

Deceiving court,—see *Attorney and Client*, 1, 2.

Injunction by one department against prosecution of action pending in another,—see *Injunction*, 11, 12.

Judge may state reasons for ruling on evidence,—see *Criminal Law*, 9.

Jurisdiction in matter of seizure and destruction of intoxicating liquors,—see Intoxicating Liquors, 11-16.

Power over judgments,—see Judgments, 3-6, 10-13.

Power to grant new trial—Limitation,—see New Trial, 19, 20.

Power to strike verdict from files,—see Verdicts, 6.

Remarks of judge during trial deemed objectionable,—see Appeal and Error, 4; Criminal Law, 46.

Unwarranted curtailment of argument of defendant's counsel in criminal prosecution,—see Criminal Law, 44-46.

Jurisdiction—Special Administrators.

1. The district court is without power to require a special administrator to go beyond the fair import of the terms of the statute governing his actions.—*In re Williams' Estate*, 63.

Appeal and Error—Effect of Perfection of Appeal.

2. After an appeal had been perfected by intervenor from a judgment dismissing his complaint, the district court lost jurisdiction of the cause so far as his rights were concerned, and was without authority subsequently to decree that he was not entitled to any of the funds in controversy in the action in which he sought to intervene.—*Moreland v. Monarch Mining Co.*, 419.

#### DITCHES.

See Waters and Water Rights.

#### DIVORCE.

See Husband and Wife.

#### DOCTRINE OF RELATION.

See Waters and Water Rights, 2.

#### EASEMENTS.

See, also, Waters and Water Rights, 1-15.

Nature of Right Acquired.

1. An easement implies a permanent interest in real estate, and, generally speaking, can be created only by an instrument in writing or by prescription.—*Babcock v. Gregg*, 317.

Cities and Towns—Streets—Easement by Prescription.

2. The mere use of land as a public street or highway for the statutory period, not coupled with an assumption of jurisdiction over it by the city authorities, does not vest the city with title by prescription to an easement in it.—*Barnard Realty Co. v. City of Butte*, 384.

Same—Easement by Prescription—How Acquired.

3. A city cannot acquire a prescriptive right to an easement in land for street purposes, unless public travel has pursued a definite, fixed course over it for the statutory period.—*Barnard Realty Co. v. City of Butte*, 384.

Same—Acquisition of Easement—*Quantum* of Proof.

4. The assertion of an easement in land for street purposes based upon adverse user for the statutory period, must be supported by clear and convincing proof.—*Barnard Realty Co. v. City of Butte*, 384.

#### ELECTION.

To be or not to be bound by Workmen's Compensation Act,—see Workmen's Compensation, 4-6.

## ELECTIONS.

Compensation of officer pending contest,—see Legislature, 1, 2.

Special Elections—County High Schools—Failure to Publish Notice—Effect.

1. Where the electors had actual notice of and participated generally in a special election held to determine the advisability of issuing bonds for high school purposes, failure of the county clerk to publish in a newspaper the notice required by section 531, Revised Codes, did not avoid the election.—Wright v. Flynn, 61; Leary v. Young, 275.

Mandamus—Primary Election Law—County Central Committee—Power to Make Original Nomination.

2. Held, that neither section 16 nor section 32 of the Primary Election Law (Laws of 1913, p. 570) empowers a county central committee to make an original nomination of a candidate to an office to be filled at a special election, the officer-elect having died soon after election and before induction into office.—State ex rel. Smith v. Duncan, 376.

Same—Filling Vacancy—Power of County Central Committee.

3. A vacancy caused by the death of a state senator soon after election but before induction into office was a vacancy in the office and not in the candidacy of the nominee for the office, which latter vacancy the county central committee could properly have filled under the provisions of the Primary Election Law, while the former it had no power to fill (see paragraph 2 above.)—State ex rel. Smith v. Duncan, 376.

Same—Nominations—How Made.

4. Held, that since the Primary Election Law (Laws 1913, p. 570), is made applicable only to general elections, fails to provide for the nomination of candidates to be voted for at special elections, and does not repeal prior statutes on the latter subject, sections 521 and 524, Revised Codes, are still in force, and therefore nominations of candidates to be voted for at special elections must be made pursuant to the provisions of either section 521 or 524.—State ex rel. Reibold v. Duncan, 380.

Same—Duty of County Clerk.

5. Held, on application for writ of mandate, that where a large number of qualified electors joined under the provisions of section 524, Revised Codes, in a certificate nominating a candidate for state senator to be voted for at a special election and presented same to the county clerk for filing, it was that officer's duty to file it, under paragraph 4 above.—State ex rel. Reibold v. Duncan, 380.

## ELECTRICITY.

Electrification system of railroads—Taxation,—see Taxation, 6, 7.

## EMBLEMENTS.

See Crops.

## EQUITY.

Appeal—Extent of review in equity cases,—see Appeal and Error, 20.

Decree based on incompatible theories—Review,—see Appeal and Error, 22.

Jury trial—Special findings,—see Jury, 4.

Duty of Plaintiff.

1. One seeking specific performance must come into court with clean hands and with a cause the ethical qualities of which are such as to commend it to the conscience of the chancellor.—Interior Securities Co. v. Campbell, Receiver, 459.

## ESCROW.

## Definition.

1. An "escrow" is a written instrument delivered to a third person to take effect upon the happening of a contingency and delivery of it to the person entitled to it.—Glendenning v. Slayton, 586.

## What not Susceptible of Being Placed in Escrow.

2. Under the above definition, neither money nor a receipted bill, deposited in bank under an agreement between parties to a proposed lease of coal land, could properly become the subject of an escrow, neither being a written contract.—Glendenning v. Slayton, 586.

## ESTATES OF DECEASED PERSONS.

Actions against—Declarations and admissions—Admissibility in evidence,—see Evidence, 36–40.

Rights of posthumous heir,—see Descent and Distribution, 1–3.

## ESTOPPEL.

See Banks and Banking, 5.

By deed—Real property,—see Nuisances, 5.

## EVIDENCE.

See, also, Witnesses.

Conflict in—Affirmance of judgment,—see Appeal and Error, 1, 6, 16, 18.

Experiments,—see Criminal Law, 24.

Interpreters,—see Criminal Law, 5–7.

Newly discovered,—see New Trial, 1; Criminal Law, 20–25.

## Murder—Self-defense—Admissibility.

1. Evidence of hostile encounters between defendant and the deceased on the evening of and previous to the killing for which defendant was being tried was admissible to ascertain the state of mind of the parties at the time and thus to determine who was the aggressor.—State v. Inich, 1.

## Trial—Cross-examination—Rule.

2. Cross-examination must be limited to matters about which the witness has testified in his examination in chief.—State v. Inich, 1.

## Same—State's Witnesses—Refusal to Call.

3. Refusal of the court to require the state to call and examine an eye-witness to the crime whose name was indorsed on the information was proper.—State v. Inich, 1.

## Same—Defendant as Witness—Cross-examination.

4. Defendant having chosen to become a witness in his own behalf, became subject to cross-examination as to admissions made by him, to the same extent as any other witness.—State v. Inich, 1.

## Same—Cross-examination of Defendant—Harmless Error.

5. Requiring defendant to answer on his cross-examination as to immaterial matters was harmless where they had been gone into fully in the examination of other witnesses.—State v. Inich, 1.

## Same—Trial—Evidence—Remarks by Judge.

6. A trial judge may state his reasons for his rulings in admitting and excluding evidence, so long as he refrains from expressing an opinion as to the weight, leaving this to the judgment of the jury. State v. Inich, 1.

## Same—Witnesses—Repetition of Questions—Harmless Error.

7. Where a witness had enumerated all the persons present at a shooting, requiring an answer to an inquiry whether he was positive

- that no one else was there resulted in useless repetition but not in prejudicial error.—*State v. Inich*, 1.
- Alienation of Affections—Domestic Trouble—Evidence—Admissibility.**
8. Evidence of domestic trouble between husband and wife may properly be considered by the jury in mitigation of damages sought in an action for the alienation of the husband's affections.—*Moelleur v. Moelleur*, 30.
- Grand Larceny—Possession of Stolen Property.**
9. Possession of property recently stolen is only a strong circumstance indicating guilt, not alone sufficient to warrant conviction of offense of larceny.—*State v. Mullins*, 95.
- Same—Circumstantial Evidence—When Sufficient.**
10. When a conviction is sought upon circumstantial evidence, the proof must be such as not only to authorize a belief in the guilt of the accused, but also to exclude every other reasonable hypothesis.—*State v. Mullins*, 95.
- Same—Conviction—Quantum of Evidence Required.**
11. One charged with crime may be convicted only upon evidence establishing his guilt beyond a reasonable doubt, *i. e.*, upon proof such as to logically compel the conclusion that the charge is true.—*State v. Mullins*, 95.
- Appeal and Error—Offer of Proof—When Unnecessary.**
12. The rule requiring an offer of proof by the party who desires to preserve for review a ruling sustaining an objection to a question put to a witness does not apply when the question indicates the evidence sought, or where the effect of the ruling is to exclude all evidence on a given subject under a mistaken notion that it is not within the issues.—*Eby v. City of Lewistown*, 113.
- Streets—Change of Grade—Damages.**
13. Under allegations of the complaint that plaintiff's property had been permanently injured by change in street grade, rendered inaccessible and undesirable for the purposes for which used, necessitating large expenditures in filling and adjusting the lots to grade, *etc.*, and defendant's denial of any damage whatever, the latter was entitled to introduce evidence tending to show that the property had not been injured or that the damage was less than claimed by plaintiff.—*Eby v. City of Lewistown*, 113.
- Same—Change of Grade of Street—Measure of Damages.**
14. Evidence showing cost of filling plaintiff's lot and raising his buildings to grade, and the market value of the property before and after making the improvement, was competent and material in an action for damages occasioned by the change.—*Eby v. City of Lewistown*, 113.
- Criminal Law—Felony—Inspection of Papers—Statutes.**
15. The provision of section 7138, Revised Codes, that the court may order a litigant to permit his opponent to inspect entries of accounts, papers, *etc.*, in his possession or under his control relating to the merits of the action, refers only to such matters as might be introduced in evidence, and not to *ex parte* statements of a prosecuting witness touching the facts and circumstances surrounding the commission of a crime, reduced to writing by and in possession of the county attorney.—*State v. Hall*, 182.
- Partnership—Elements of—Evidence—Sufficiency.**
16. To establish the existence of a partnership it is not necessary that its elements should be made to appear by direct evidence; if the jury could, from the evidence before them, draw the legitimate inferences required to complete proof of its existence, it was sufficient.—*Silver v. Eakins*, 210.

**Copies of Entries in Bank Books—Inadmissibility.**

17. Copies of accounts taken from a bank ledger, being secondary evidence, were inadmissible under section 7872, Revised Codes, but the witness called to testify concerning them could properly show the general results shown by the ledger, i. e., the balance deducible from computation.—*Silver v. Eakins*, 210.

**Use of Memorandum—Preliminary Proof.**

18. The use of a memorandum by a witness in testifying is, under section 8020, Revised Codes, permissible only after the necessary preliminary proof qualifying the witness has been made.—*Silver v. Eakins*, 210.

***Res Gestae.***

19. In an action for wrongful ejection from a hotel, evidence of what occurred in the lobby after plaintiff and her husband started to leave the place was admissible as part of the *res gestae*.—*Jones v. Shannon*, 225.

**Transaction With Deceased Person—Declarations—Admissibility.**

20. In a suit to foreclose a mortgage alleged to have been procured by the fraud of plaintiff's associate, since deceased, defendant could not be rendered incompetent to testify as to transactions with the associate by the unsupported assertion that he was plaintiff's agent and that therefore, under subdivision 4 of section 1, Chapter 41, Laws of 1913, evidence of declarations made by or communications had with such agent was inadmissible.—*Wilcox v. Schissler*, 246.

**Change of Venue—Affidavits—Conclusions.**

21. Statements in affidavits filed by defendant indemnity company in support of its motion for a change of venue, to the effect that the contract of indemnity sued upon was to be performed by making payment at its home office, held legal conclusions and without evidentiary value.—*State ex rel. Western A. & I. Co. v. District Court*, 330.

**Rape—Sufficiency.**

22. In a prosecution for rape, the uncorroborated direct testimony of the prosecutrix, if believed, establishes the guilt of defendant.—*State v. Tate*, 343.

**Criminal Law—Evidence—Suspicion of Guilt Insufficient.**

23. Suspicion, however well founded, that defendant is guilty of the crime for the commission of which he is being tried, does not justify a conviction.—*State v. Brower*, 349.

**Same—Circumstantial Evidence—Sufficiency—Rule.**

24. Where circumstantial evidence is relied on to convict of crime, the circumstances proved must be consistent with each other and so clearly justify the conclusions of guilt that they exclude any other rational hypothesis.—*State v. Brower*, 349.

**Same—Burglary—Circumstantial Evidence—Insufficiency.**

25. Evidence, wholly circumstantial in character, held insufficient, under the above rules, to warrant defendant's conviction of the crime of burglary in the night-time.—*State v. Brower*, 349.

**Work and Labor—Evidence of Value—Expert Testimony.**

26. A housekeeper and laundress of long experience was qualified to testify to the reasonable value of her services rendered and the supplies furnished defendant while boarding him.—*Matoole v. Sullivan*, 363.

**Building Contracts—Remedying Defects—Evidence—Proper Exclusion.**

27. In the absence of evidence that the reasonable value of a new roof covering did not exceed a covering laid by plaintiff according to plans and specifications, evidence as to the amount paid by de-

fendant for the new work was properly excluded.—*Roberts v. Sinnott*, 369.

**Waters and Water Rights—Ditches—Easements—Extent of User.**

28. The extent of an easement acquired by adverse user is measured by the extent of the use; hence evidence of the amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible.—*Lowry v. Carrier*, 392.

**Same—Ownership—User.**

29. The owner of a ditch right cannot be compelled to surrender it merely because its function can be performed by another ditch owned by him and not in dispute; hence evidence tending to show that all his irrigable land could be watered from a ditch other than the one title to which was at issue, was inadmissible.—*Lowry v. Carrier*, 392.

**Same—Nonuser—Abandonment.**

30. Evidence of limited use or nonuser of an irrigating ditch is not alone sufficient to establish abandonment.—*Lowry v. Carrier*, 392.

**Contracts—Varying Terms—Rule—Exception.**

31. The rule declared by section 7873, Revised Codes, that in a controversy between the parties to a written contract or their privies, parol evidence cannot be introduced to vary, enlarge or contradict its terms, etc., has no application in a controversy between a party to the contract and a stranger.—*Read v. Lewis and Clark County*, 412.

**Homicide—When Excusable.**

32. To justify a finding that a homicide by shooting was excusable, under section 8299, Revised Codes, where defendant and deceased were strangers, the evidence must show that when the shot was fired, defendant was doing a lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent.—*State v. Kuum*, 436.

**Same—When Unintentional.**

33. Where, in a prosecution for homicide, the evidence showed that defendant and deceased were strangers and apparently friendly; that there was no swearing or threatening language used by either; that defendant was much intoxicated at the time; that deceased himself stated that the shot was an accident, and that there was no motive for the shooting, the conclusion follows that the killing was unintentional.—*State v. Kuum*, 436.

**Same—Murder in Second Degree—Presumptions.**

34. Where the state establishes the killing of deceased by defendant, and there is no evidence tending to show circumstances of mitigation or to justify or excuse it, the presumption arises that the killing was prompted by malice and was murder in the second degree; and the burden thereupon is upon defendant to produce evidence sufficient to create a reasonable doubt of the existence of malice, if he would reduce the degree of homicide to manslaughter. *State v. Kuum*, 436.

**Promissory Notes—Statements Made After Transfer—Irrelevancy.**

35. Statements of officers of a bank suing on a promissory note, made months after its purchase for value and having no bearing upon the dealings between the maker and the payee's agent which culminated in the giving of the note, could not affect its transfer to plaintiff bank and were irrelevant.—*Citizens' State Bank v. Snelling*, 476.

**Deceased Person—Declarations and Admissions—Admissibility.**

36. Though evidence of declarations or admissions of a deceased person against his interest is not the most satisfactory kind of evidence, it is by section 7870, Revised Codes, made competent, and must be considered as any other fact by court or jury, the statements of the witness deposing to either however, to be accepted with caution.—*Roy v. King's Estate*, 567.

**Same—Declarations and Admissions—Admissibility.**

37. Where, in an action against an estate to recover for goods, wares and merchandise furnished to and services performed for decedent in his lifetime, a declaration or admission,—definitely identified by the witness deposing to it,—acknowledging the debt, was deliberately and understandingly made, it is evidence sufficient to make out a *prima facie* case.—*Roy v. King's Estate*, 567.

**Same—Declarations and Admissions—Weight of Evidence.**

38. Where evidence of declarations or admissions by a decedent against his interest is aided by the testimony of witnesses who know of the dealings between plaintiff and decedent and testify from such knowledge as to articles furnished to and services performed for the latter, it is entitled to added weight.—*Roy v. King's Estate*, 567.

**Same—Declarations and Admissions—Admissibility—Discretion.**

39. *Held*, that the provision of section 7891, Revised Codes, as amended (Laws 1913, p. 57), declaring plaintiff in an action against an executor or administrator an incompetent witness, unless it appears to the court that without his testimony injustice will be done, lodges determination of the question of the admissibility of plaintiff's testimony within the sound discretion of the court, and that refusal of permission to testify was not an abuse of such discretion where there was sufficient evidence to make out a *prima facie* case without plaintiff's testimony.—*Roy v. King's Estate*, 567.

**Value—Opinion Evidence—Admissibility.**

40. A farmer who was acquainted with the market value of farm products during the year they were furnished by his wife to defendant administrator's intestate, was qualified to answer the question whether the amounts charged for the various items in the account sued upon were fair and reasonable.—*Roy v. King's Estate*, 567.

**Promissory Notes—Oral Modification—Inadmissibility.**

41. An unexecuted oral agreement the effect of which was to alter the terms of a promissory note by extending the time of payment and changing the amount due, constituted no defense, under section 5067, Revised Codes, to the enforcement of the note; hence evidence tending to prove the agreement was improperly admitted.—*Lish v. Martin*, 582.

**EXCEPTIONS.**

See Appeal and Error, 2; Bill of Exceptions.

**EXECUTIONS.****Real Property—Execution Sale—Purchaser—Right to Possession.**

1. *Semble*: It would seem that the purchaser of land at execution sale is, as against the execution debtor, entitled to possession during the period of redemption.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

**Crops—Chattels Personal.**

2. Crops of wheat, oats, etc., are emblements—*fructus industriales*—and as such are usually treated as chattels personal, subject to sale or mortgage, and levy of attachment or execution, even while still annexed to the soil.—*Power Merc. Co. v. Moore Merc. Co.*, 401.



EXECUTORS AND ADMINISTRATORS.

Actions against—Deceased persons—Declarations and admissions—Admissibility,—see Evidence, 36-40.

Special Administrators—Who Entitled to Appointment.

1. Where the necessity for a special administrator arises in the administration of an estate, a person named executor in the will is, under section 7472, Revised Codes, entitled to be appointed as such. In re Williams' Estate, 63.

Same—Powers and Duties.

2. The office of special administrator is statutory, his powers and duties are limited to those enumerated in the statute (secs. 7470-7476, Rev. Codes), and his authority ceases automatically upon the appointment and qualification of the executor or general administrator.—In re Williams' Estate, 63.

Same—Loaning Funds—Interest.

3. A special administrator has no power to loan the funds of the estate in his charge, and therefore cannot be held to pay interest for failing to loan them.—In re Williams' Estate, 63.

Same—Who Entitled to Interest on Funds.

4. If a special administrator receives profits from funds of the estate in his keeping, such profits belong to the heirs and must be included in his final account.—In re Williams' Estate, 63.

Same—Presumptions—Abuse of Power—Burden of Proof.

5. The presumption is that the official duties of a special administrator were regularly performed and that he did not abuse his power; and the burden of showing that profits accrued to him from use of the funds of the estate is upon the objectors who charge wrongful conduct.—In re Williams' Estate, 63.

Same—Interest on Estate Funds—Unlawful Use.

6. Since a special administrator cannot lawfully invest, loan or use funds which come into his hands by virtue of his office, the only theory upon which he can be held to account for profits accruing upon them is that he made an unlawful use of them.—In re Williams' Estate, 63.

Special Administrators—Failure to Loan Funds—Interest.

7. Where a special administrator permitted estate funds to remain in an open, checking account for about nine years in a bank, all but fourteen per cent of the capital stock of which was owned by him, he was nevertheless not chargeable with interest upon the theory that by mingling the funds with those of the bank and using them he unlawfully profited by their use.—In re Williams' Estate, 63.

Same—Costs—When Disallowance Proper.

8. Where court costs incurred by a special administrator were impossible of separation from costs personal to him as residuary legatee, refusal of any credit on account of such items was proper. In re Williams' Estate, 63.

Same—Attorneys' Fees—When Allowable.

9. Attorneys' fees paid by a duly appointed special administrator in resisting the efforts of an illegally appointed public administrator to obtain possession of the property of the estate were a proper cost charge against it.—In re Williams' Estate, 63.

Same—Wrongful Withholding of Property—Payment of Taxes.

10. Credit for taxes paid by a special administrator upon property wrongfully withheld by him when he relinquished his office was properly disallowed in the absence of a showing that no prejudice to the estate resulted by reason of his omission.—In re Williams' Estate, 63.

**Same—Care of Property—Expense Chargeable to Estate.**

11. Where a special administrator permitted the person, placed in charge of furniture belonging to the estate, to use it in consideration of his services as caretaker, the damage resulting from such use was not chargeable to the administrator, it amounting to much less than the compensation a paid caretaker could have been secured for.—*In re Williams' Estate*, 63.

**Same—Costs—Liability—Rule.**

12. Where it is sought to have costs taxed against an administrator personally, the controlling inquiry is whether he acted in good faith; if so, justice requires that they be paid out of the funds of the estate.—*In re Williams' Estate*, 63.

**Same—Costs—Liability.**

13. *Held*, under the above rule, that costs of defeating the unjust claim against a special administrator that he pay interest on estate funds while in his hands were improperly charged against him.—*In re Williams' Estate*, 63.

**Same—District Court—Jurisdiction.**

14. The district court is without power to require a special administrator to go beyond the fair import of the terms of the statute governing his actions.—*In re Williams' Estate*, 63.

**EXEMPTIONS.**

From taxation,—see *Taxation*, 9-22.

**EXPERIMENTS.**

Evidence of—When insufficient to constitute newly discovered evidence,—see *Criminal Law*, 24.

**EXPERT AND OPINION EVIDENCE.**

See *Evidence*, 26, 40.

**FEDERAL EMPLOYERS' LIABILITY ACT.**

See *Personal Injuries*, 10-13.

**FEEES.**

See *License Fees*.

**FINDINGS.**

See, also, *Pleading and Practice*, 4.

On conflicting evidence,—see *Appeal and Error*, 7.

On special findings,—see *Jury*, 4.

**Injunction—New Trial—Review of Evidence.**

1. The question of the sufficiency of the evidence to support the findings of the court in a suit for an injunction may be raised on appeal from the order denying a new trial.—*Babcock v. Gregg*, 317.

**FIREARMS.**

Negligent handling and pointing loaded—*Assault*,—see *Criminal Law*, 52, 54.

**FORECLOSURE.**

See *Mortgages*.

FRANCHISES.

See Cities and Towns, 1-13.

FRAUD.

Promissory notes—Cancellation—Burden of proof,—see Bills and Notes, 12-14.

Rescission,—see Contracts, 2, 3, 6.

Material Facts.

1. To constitute actionable fraud, the representations relied upon for rescission of a contract must relate to material facts.—Stillwell v. Rankin, 130.

What may Constitute "Material Facts."

2. Representations made to a stockholder in a company by a broker that 100 shares of its capital stock had been turned back into its treasury by a subscriber unable to pay therefor and soliciting plaintiff to buy it "to help the company out," held to have related to a material matter within the meaning of section 4978, Revised Codes, defining fraud.—Stillwell v. Rankin, 130.

When Relief not to be Granted.

3. Neither law nor equity will grant relief to one who enters into a written contract without reading it, if the other party to it is not guilty of deceit or false representations as to its contents by means of which the plaintiff is put off his guard.—Wilcox v. Schissler, 246.

Defenses.

4. A person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that, had not the other party been so ignorant and negligent, he could not have succeeded in deceiving him.—Wilcox v. Schissler, 246.

Mortgage Foreclosure—Defenses.

5. In a suit to foreclose a mortgage, evidence held to support a finding that it and the promissory note which it secured were procured by the fraud of plaintiff's brother and uncle of defendant, with plaintiff's knowledge.—Wilcox v. Schissler, 246.

Same—Transaction With Deceased Person—Evidence—Admissibility.

6. In a suit to foreclose a mortgage alleged to have been procured by the fraud of plaintiff's associate, since deceased, defendant could not be rendered incompetent to testify as to transactions with the associate by the unsupported assertion that he was plaintiff's agent and that therefore, under subdivision 4 of section 1, Chapter 41, Laws of 1913, evidence of declarations or communications with such agent was inadmissible.—Wilcox v. Schissler, 246.

What not Actionable Fraud.

7. Statements in the nature of prophecies made by a promoter of stock, to the effect that profits of the corporation proposed to be formed would be large, that all but the first payment on the subscription price would be taken care of by the profits, that a large number of bankers had subscribed and would become active agents for the company, etc., held insufficient to charge actionable fraud.—Citizens' State Bank v. Snelling, 476.

GAS.

Regulation of rates,—see Cities and Towns, 1-13.

GRAND LARCENY.

See Criminal Law, 26-29.

## HARMLESS ERROR.

See Appeal and Error, 4; Evidence, 5, 7; Instructions, 6.

## HEIRSHIP.

See Descent and Distribution.

## HOMICIDE.

See Criminal Law, 1-25, 50-58.

## HOTELS.

See Innkeepers, 1-7.

## HUSBAND AND WIFE.

Injunction against enforcing judgment in suit for separate maintenance,—see Injunction, 10.

## Alienation of Affections—Right of Action.

1. A wife cannot maintain an action for the alienation of the affections of the husband if it appears that the latter voluntarily bestowed them on defendant, she having done nothing wrongful to win them.—*Moelleur v. Moelleur*, 30.

## Same—Defenses.

2. The fact that husband and wife had quarreled frequently does not bar the latter from recovery in an action for damages for alienation of the husband's affections.—*Moelleur v. Moelleur*, 30.

## Same.

3. Estrangement between husband and wife is no defense in an action for alienation of affections, inasmuch as the wife had a right to rely upon the possibility of reconciliation so long as the relationship of husband and wife had not been severed.—*Moelleur v. Moelleur*, 30.

## Same—Domestic Trouble—Evidence—Admissibility.

4. Evidence of domestic trouble between husband and wife may properly be considered by the jury in mitigation of damages sought in an action for the alienation of the husband's affections.—*Moelleur v. Moelleur*, 30.

## Same—Evidence—Sufficiency.

5. Evidence in an action for the alienation of affections held sufficient to sustain the jury's finding that defendant was the procuring cause of the estrangement between plaintiff and her husband.—*Moelleur v. Moelleur*, 30.

## Same—Punitive Damages—Malice—Jury Question.

6. Punitive damages may be awarded in an action for the alienation of a husband's affections, even though the evidence furnishes no basis for a finding of malice, since malice may be implied from the conduct of a defendant in causing the wrong complained of, its existence being a question for the jury.—*Moelleur v. Moelleur*, 30.

## Separation Agreement—When Binding upon Parties.

7. Under sections 3694-3698, Revised Codes, husband and wife may agree, in writing, to an immediate separation, making provision for the support of either of them, the mutual consent of the parties being a sufficient consideration; and if fairly made and executed, free from fraud or imposition, coercion or duress, courts will uphold and enforce such an agreement.—*Lee v. Lee*, 426.

## Divorce—Alimony—Suit Money—Counsel Fees—Erroneous Allowance.

8. Where suitable provision had been made by the husband for the support of the wife, in a separation agreement, which among other

things provided that it should constitute a full settlement of all property rights in case a divorce action should result, in which event the husband should not be required to pay the wife alimony, suit money or counsel fees, it was error for the court, in an action for divorce by the husband, to ignore the terms of the agreement and make allowances to the wife in all three particulars, in the absence of a pleading attacking the validity of the agreement on the ground of fraud, duress, etc., or one disclosing a defense to the action on its merits.—*Lee v. Lee*, 426.

Same—Decree—Modification—Nonappealable Order.

9. An appeal does not lie from an order overruling a motion to strike an affidavit filed in support of a motion for the modification of a decree granting a divorce, such order not being one of the orders made appealable by section 7098, Revised Codes, nor a special order made after final judgment from which an appeal may be taken.—*Weed v. Weed*, 599.

#### INDEMNITY.

Place of payment,—see *Venne*, 2-5.

#### INDUSTRIAL ACCIDENT BOARD.

See *Workmen's Compensation*.

#### INFANTS.

See *Descent and Distribution*; *Personal Injuries*, 5-9.

#### INFORMATIONS.

Refusal to call witness whose name was indorsed on,—see *Criminal Law*, 11.

#### INITIATIVE AND REFERENDUM.

When inapplicable,—see *Cities and Towns*, 20.

#### INJUNCTION.

Promissory Notes—Transfer—Injunction *Pendente Lite*—Evidence.

1. The fact that defendant's evidence contradicted the allegations of the complaint, which was verified positively and thus had the effect of an affidavit, did not deprive the district court of power to grant an injunction restraining defendant from transferring promissory notes pending suit for their cancellation for fraud.—*Stillwell v. Rankin*, 130.

Same—Transfer—Injunction *Pendente Lite*—Discretion.

2 and 3. Courts of equity are inclined to be liberal in restraining *pendente lite* the transfer of negotiable promissory notes alleged to have been procured by fraud, when such transfer will defeat the right of the makers to interpose their defense as against holders in due course.—*Stillwell v. Rankin*, 130.

Leases—Sale of Land—Removal of Building—Complaint—Sufficiency.

4. Complaint in an action by the assignee of a lease of a building used for business purposes, the lease being for term of years still existing, to enjoin the owner thereof from moving it to another site, *held* sufficient to withstand a general demurrer.—*Wheeler v. McIntyre*, 295.

Same—Complaint—Unnecessary Allegations.

5. To entitle the assignee of a lease for years to an injunction against the removal of the building in which he conducts business, he need not show that the threatened wrong would, if committed, interfere with or

destroy his business or that defendant is unable to answer in damages.—*Wheeler v. McIntyre*, 295.

**Same—Continuing Trespass—Multiplicity of Actions.**

6. Injunction lies to prevent a multiplicity of actions at law for damages which would be caused by the threatened commission of continuing and repeated trespasses upon plaintiff lessee's estate in the building attempted to be moved to another site.—*Wheeler v. McIntyre*, 295

**Same—Rights of Lessee.**

7. Knowledge in the assignee prior to taking over a lease of a building that the owner had sold the lot and contemplated removal of the structure to another site before expiration of the lease, could not affect his rights under the lease or deprive him of the right to an injunction restraining removal of the building.—*Wheeler v. McIntyre*, 295.

**Same—Doctrine of Comparative Injury.**

8. In determining whether injunction should issue to restrain the threatened removal of a building held under lease, the doctrine of relative or comparative injury and inconvenience should be resorted to only when the party whose rights are threatened with invasion or destruction can be thoroughly protected.—*Wheeler v. McIntyre*, 295.

**Ditches—Interference—Title—Complaint—Surplusage.**

9. In a suit for injunction to restrain interference with an irrigating ditch and to compel removal of an obstruction planted therein by defendant, plaintiff need not plead the character of title by which he holds the right of way for his ditch; where he does so, the allegation may be treated as surplusage.—*Babcock v. Gregg*, 317.

**Res Adjudicata—Successive Applications.**

10. Where a husband failed to appeal from an order denying him an injunction against his wife, to prevent her from enforcing a judgment she had obtained in a suit for separate maintenance, pending determination of his suit for annulment of the marriage, he was bound by it, and could not thereafter apply for the same relief upon substantially the same state of facts either in the suit for annulment or one instituted for the sole purpose of securing an injunction.—*Bown v. Somers*, 434.

**Against Prosecution of Action.**

11. Injunction does not lie to prevent the prosecution of an action at law, jurisdiction over the subject matter of which has been acquired by another court, unless necessary to prevent a multiplicity of suits, or unless there is some equitable circumstance in the case of which a party cannot avail himself at law.—*Lutey Bros. v. Jackson*, 556.

**Same—Department of District Court.**

12. Where a writ of attachment had issued in one department of the district court in a cause pending therein, another department of the same court was without jurisdiction to enjoin, at the instance of defendant, further action in the attachment proceeding, his remedy lying in application to the first department for appropriate relief.—*Lutey Bros. v. Jackson*, 556.

INNKEEPERS.

**Rights of Guest—Use of Room.**

1. A guest at a public house is entitled to the exclusive use of the room to which he is assigned, subject to the right of the proprietor as well as his servants and agents, to have access to it when necessary to the proper and reasonable discharge of their duties at such

times and in such manner as is consistent with the rights of the guest.  
*Jones v. Shannon*, 225.

**Rights of Proprietor—Ejection of Guest.**

2. In the exercise of his duty to see that a guest does not so conduct himself as to be a source of annoyance and discomfort to other guests, the proprietor of a public house may, if he finds it necessary to perform his duty in that regard, enter the room occupied by such guest and eject him therefrom and from the house, provided he uses no more force than is necessary.—*Jones v. Shannon*, 225.

**Ejection of Guest—Compensatory and Exemplary Damages.**

3. A hotel proprietor who wrongfully forces an entry into the room of a guest and without just cause ejects him from it and the house is liable not only for compensatory but also exemplary damages, if the ejection is accompanied by circumstances indicating that it was prompted by malice, fraud or a spirit of oppression.—*Jones v. Shannon*, 225.

**Same—Compensatory Damages—Evidence—Sufficiency.**

4. Evidence *held* sufficient to justify a verdict for compensatory damages against defendant innkeeper for wrongfully ejecting plaintiff from her room in the early hours of the morning, under a charge that she was conducting herself in a disorderly manner.—*Jones v. Shannon*, 225.

**Same—Malice—Exemplary Damages.**

5. Where a guest at a hotel was wrongfully ejected from her room at night without just reason or excuse by the owner's wife, who further exacted payment of an unlawful demand before permitting the guest to leave the house, the jury were justified in the conclusion that the ejection was prompted by malice warranting a finding for exemplary damages.—*Jones v. Shannon*, 225.

**Same—Malice of Agent—Liability of Principal.**

6. *Held*, under the rule that a principal is not accountable for the malignant motives of his agent unless he authorized the act for which recovery is sought, participated in its commission or subsequently ratified it, that a hotel-keeper who was not present, took no part in nor subsequently ratified his wife's wrongful act in ejecting a guest from the house, was not liable in exemplary damages, since the malice of his wife was not imputable to him.—*Jones v. Shannon*, 225.

**Same—Excessive Verdict.**

7. *Held*, that a verdict of \$500 against a hotel-keeper and his wife jointly as compensatory damages for wrongfully ejecting plaintiff from her room and the house at night, and \$250 against the wife as exemplary damages, was not excessive.—*Jones v. Shannon*, 225.

**Evidence—*Res Gestae*.**

8. In an action for wrongful ejection from a hotel, evidence of what occurred in the lobby after plaintiff and her husband started to leave the place was admissible as part of the *res gestae*.—*Jones v. Shannon*, 225.

## INSANITY.

Proper refusal of instruction on question of defendant's,—see *Criminal Law*, 58.

## INSURANCE.

License fee payable by corporations,—see *Taxation*, 1-5.

Place of payment,—see *Venue*, 1-5.

## INSTRUCTIONS.

## INSTRUCTIONS.

**Criminal Law—Instruction as to Guilt or Innocence of Defendant.**

1. An instruction that "the whole of your number must agree in finding the defendant guilty or not guilty," held not objectionable as denying the jury the liberty of reaching a disagreement.—*State v. Inich*, 1.

**Same—Insufficient Instruction—Duty of Appellant.**

2. Failure of defendant to offer an instruction more specific than one complained of as erroneous bars him from alleging error in the giving of the latter.—*State v. Inich*, 1.

**Same—Requested Instructions—Refusal—When not Error.**

3. Where the court had instructed the jury fully on the matter of self-defense, it was not reversible error to refuse requested instructions thereon although the court might properly have given them.—*State v. Inich*, 1.

**Personal Injuries—Master not Insurer—Erroneous Instruction.**

4. An unqualified instruction that it was the duty of defendant to provide sufficient number of men to perform the task in hand was erroneous, as constituting the master an absolute insurer of the safety of his servant.—*Markinovich v. Northern Pac. Ry. Co.*, 139.

**Criminal Law—Settlement of Instructions—Not Part of Trial—Presence of Defendant.**

5. The settlement of the instructions being no part of the "trial" within the meaning of section 9233, Revised Codes, requiring the presence of one charged with felony, throughout the trial, his absence during such settlement does not constitute reversible error.—*State v. Hall*, 182.

**Personal Injuries—Imputed Negligence—Harmless Error.**

6. Where the jury properly found that plaintiff was guilty of contributory negligence and therefore could not recover damages, the giving of an erroneous instruction touching the doctrine of imputed negligence was nonprejudicial.—*Sherris v. Northern Pacific Ry. Co.*, 189.

**Disregard by Jury—New Trial.**

7. Where the jury has disregarded a specific instruction, the supreme court will not inquire whether it is correct in point of law, but will direct a new trial, unless affirmance is required under section 7118, Revised Codes, prohibiting reversal where the proper result was reached notwithstanding the error committed.—*De Young v. Benepe*, 306.

**Duty of Jury to Obey—Presumptions.**

8. In the absence of anything to indicate the contrary, it will be assumed on appeal that the jury observed the instructions of the trial court.—*Roberts v. Sinnott*, 369.

**Homicide—Insanity—Proper Refusal.**

9. Evidence that defendant's reason had been clouded by intoxication during the earlier hours of the homicide, and that he suffered periodical attacks due to a diseased condition of the heart, did not warrant an instruction upon the question of his insanity.—*State v. Kuum*, 436.

**Bankruptcy—Instructions—Inapplicability.**

10. An instruction that payment of money, due a bankrupt, to the bankrupt's creditor to avoid the possibility of the filing of a materialman's lien by the creditor, would not be a defense in an action to recover the payment as an unlawful preference under the Bankruptcy Act was proper in the absence of evidence that the defendant had perfected such lien.—*De Forrest, Trustee, v. Crane & Ordway Co.*, 489.



INTEREST.

On funds of estates of deceased persons,—see Executors and Administrators, 3, 4, 6, 7.

INTERPLEADER.

See Interventions.

INTERPRETERS.

Appointment—Discretion,—see Criminal Law, 5-7.

INTERSTATE COMMERCE.

Burden of proof,—see Personal Injuries, 11.

INTERVENTION.

Attachment—Right of Third Party Claimant.

1. A third party who claimed to own property which had been attached to secure any judgment which might be recovered in an action, had such an interest in the subject matter of the litigation as to entitle him under section 6496, Revised Codes, to intervene and have his rights determined.—*Moreland v. Monarch Min. Co.*, 419.

Same—Alternative Remedies—Effect.

2. The fact that a party claiming an interest in attached property may have a remedy, after seizure or sale, under section 6673, Revised Codes, or by an action in conversion or replevin, does not deprive him of his right to intervene in the action in which the attachment was procured.—*Moreland v. Monarch Min. Co.*, 419.

Purpose of Legislation.

3. The purpose of section 6496, Revised Codes, permitting any person to intervene in an action if he has an interest in the subject matter in litigation, is to avoid circuitry of action and multiplicity of suits.—*Moreland v. Monarch Min. Co.*, 419.

INTOXICATING LIQUORS.

“Ardent Spirits”—“Spirituous Liquors.”

1. “Ardent spirits” and “spirituous liquors” express the same meaning and are used interchangeably in the prohibition law (Chaps. 143, 175, Laws 1917); hence absolute prohibition against the sale, *etc.*, of ardent spirits, likewise interdicts the sale, *etc.*, of spirituous liquors, without regard to alcoholic content.—*State v. Centennial Brewing Co.*, 500.

Statutory Construction—Amendments.

2. *Held*, that the Act (Chap. 143, Laws 1917), which provides the machinery for the enforcement of the prohibition law (Chap. 175, Laws 1917), does not amend the latter Act, either directly or by implication, so as to make legal the sale of spirituous, vinous, fermented or malt liquors containing less than two per cent of alcohol measured by volume.—*State v. Centennial Brewing Co.*, 500.

Same.

3. *Held*, that since spirituous, vinous, fermented or malt liquors are beverages, a construction of section 2 of Chapter 143, Laws of 1917, which would have the effect of declaring that their sale is not prohibited if they are incapable of being used as beverages, is not permissible.—*State v. Centennial Brewing Co.*, 500.

Same.

4. *Held*, that a construction of section 2 of Chapter 143, Laws of 1917, which would result in a definition of “intoxicating liquors,” as any spirituous, vinous, fermented or malt liquors which “contains” as much as two per cent of alcohol and which “is” capable of being used

as a beverage, offends against the ordinary rules of grammar and is not permissible.—*State v. Centennial Brewing Co.*, 500.

Same—Doctrine of "Last Antecedent."

5. *Held*, under the doctrine of "last antecedent" above, that the clauses, "which contains as much as two *per centum* of alcohol," etc., "and which is capable of being used as a beverage," found in section 2 of Chapter 143, Laws of 1917, defining "intoxicating liquors," qualify "liquor" and "liquid" and not the more remote terms "any spirituous, vinous, fermented or malt liquors."—*State v. Centennial Brewing Co.*, 500.

Definition—Power of Legislature.

6. If the legislature deems it necessary to the proper enforcement of the prohibition law to include within the definition of "intoxicating liquors" beverages which are in themselves harmless, they may be included.—*State v. Centennial Brewing Co.*, 500.

Prohibition Law—Statutory Construction.

7. *Held*, that whisky, brandy, gin, rum, wine, ale and spirituous, vinous, fermented or malt liquors, are by section 2, Chapter 143, Laws of 1917, declared intoxicating liquors within the meaning of the prohibition law, without reference to the amount of alcohol contained in them; *held*, further, that every other liquid or liquor—whether medicated, proprietary or patented—likewise falls within the same definition, if such liquor or liquid contains as much as two per cent of alcohol measured by volume and is capable of being used as a beverage.—*State v. Centennial Brewing Co.*, 500.

Same—Nature of Act.

8. The prohibition law is one of suppression, not of supervision.—*State v. Centennial Brewing Co.*, 500.

Definition—Omission of "Beer"—Effect.

9. Since by the prohibition law (Chap. 175, Laws 1917), the sale of beer is prohibited absolutely, and the Enforcement Act (*Id.* Chap. 143), is not an amendment of the former, the fact that the definition of "intoxicating liquors" in section 2 of the latter statute does not include "beer" is without significance.—*State v. Centennial Brewing Co.*, 500.

Malt Liquor—Sale a Crime.

10. It is a criminal offense in this state to sell malt liquor which contains less than two per cent of alcohol measured by volume.—*State v. Centennial Brewing Co.*, 500.

Seizure—Destruction—District Courts—Jurisdiction.

11. By sections 7 and 8 of Chapter 143, Laws of 1917, jurisdiction is conferred upon the district court to entertain and determine the proceeding provided for in the Act incident to the seizure, forfeiture, sale or destruction of contraband liquors.—*State ex rel. Prato v. District Court*, 560.

Same—Destruction—District Courts—Nature of Proceeding.

12. The proceeding above, though properly prosecuted in the name of the state, is not criminal in character, but must be regarded as one *in rem* against the liquors and other articles seized, instituted for their condemnation as forfeited property, the complaint being in the nature of a libel.—*State ex rel. Prato v. District Court*, 560.

Same.

13. Where, after seizure of contraband liquors, the owner appears and makes claim to them, a trial must be had in the district court of the questions of title and whether or not the liquors were being kept or used by the claimant with the intention of violating the prohibition law.—*State ex rel. Prato v. District Court*, 560.

**Same—Final Judgment—Appeal.**

4. The trial of the questions of ownership and the purpose for which seized liquors were being kept by the claimant, is one *inter partes*, and results in a final judgment affecting the rights of the state and the claimant, from which, under section 7098, Revised Codes, either party may appeal.—State ex rel. Prato v. District Court, 560.

**Same—District Court—Appeal—Certiorari.**

15. Since *certiorari* does not lie where the complaining party has an appeal from a final judgment which may be entered in the action or proceeding, *held* that the writ does not run to annul an order of the district court overruling a demurrer to a complaint filed under Chapter 143, Laws 1917, charging defendants with keeping liquors unlawfully, and an order denying them a trial by jury, their remedy being by appeal from the final judgment.—State ex rel. Prato v. District Court, 560.

**Same—Certiorari—When Writ Does not Lie.**

16. Erroneous rulings of the district court in first determining the sufficiency of the complaint and thereafter passing upon the question of defendants' right to a jury trial made during the course of the proceeding referred to above, did not deprive it of jurisdiction, so as to render them reviewable on writ of *certiorari*.—State ex rel. Prato v. District Court, 560.

**JUDGMENT-ROLL.**

See Record on Appeal.

**JUDGMENTS.**

Injunction against enforcing,—see Injunction, 4.

Jurisdiction of district court to add to, after perfection of appeal,—see District Courts, 2.

Entry—Waiver of notice,—see New Trial, 2.

Codefendants—Separate Judgment Against One.

1. In a tort action against several defendants, judgment may be rendered allowing recovery against all jointly for compensatory damages, and for exemplary damages against one only.—Jones v. Shannon, 225.

Correct Result—Wrong Reason—Surplusage.

2. Where the correct result was reached in an action involving title to real property, it is immaterial that the court adopted a wrong theory, and, the judgment being sufficient, any unnecessary recitals in it will be treated as surplusage.—Lee v. Laughery, 238.

Amendment—Power of District Court—*Certiorari*.

3. Courts have the power at any time to amend their judgments to the end that they will express what was actually decided.—State ex rel. McHatton v. District Court, 324.

**Same.**

4. Where the clerk of the District Court has failed to enter the judgment pronounced, the court has the power to correct the misprision.—Lee v. Laughery, 324.

Limit of Power of Courts to Modify.

5. After a judgment determining the rights of parties has been rendered, the court cannot, upon a change of mind, set aside or modify it so as to change the rights previously fixed thereby.—Lee v. Laughery, 324.

Decrees in Probate Proceedings—Modification—Power of District Court.

6. Though decrees in probate proceedings are not, technically speaking, judgments, district courts have no greater power over them after

rendition than they have over formal judgments, in the way of setting them aside or modifying them so as to change rights previously fixed.—*Lee v. Laughery*, 325.

**By Consent—Effect.**

7. A decree by consent has all the force and effect of a judgment *in invitum*, and is nonappealable.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**Special Order After Final Judgment—When Appealable.**

8. The special order made after final judgment from which an appeal lies must be one affecting rights incorporated in a judgment previously entered.—*Weed v. Weed*, 599.

**Amendments—New Trial—Jurisdiction.**

9. *Held*, on *certiorari*, that the district court was without power to so amend its order granting a decree of divorce after rendition and signing thereof, as in effect to award a new trial, on its own motion, on the ground of newly discovered evidence which "came to the knowledge of the court *ex parte*."—*State ex rel. Smith v. District Court*, 602.

**Same—Power of Court.**

10. The district court may amend its judgment at any time in order to make it express what was actually decided, the mistake of the clerk in entering it not being binding upon the court nor upon the parties whose rights are prejudiced thereby.—*State ex rel. Smith v. District Court*, 602.

**How to be Corrected.**

11. A judgment once rendered as intended becomes final, and can be revised or corrected only by some method pointed out by the statute.—*State ex rel. Smith v. District Court*, 602.

**Amendment—Rule—Terms of Court.**

12. *Quære*: Does the rule making a judgment once rendered as intended, final and correctible only in the mode pointed out by the statute, apply in those districts in which there are regularly fixed terms for holding court?—*State ex rel. Smith v. District Court*, 602.

**Void on Face—Effect.**

13. A judgment void on its face is a nullity and may be vacated at any time.—*State ex rel. Smith v. District Court*, 602.

**Irregularity—Voidable Judgment—Collateral Attack.**

14. The omission of the statement in the affidavit of the person who made service of summons in another state, that he was not a party to the action and over the age of eighteen years, if required, was an irregularity merely, rendering the judgment voidable and not void; it was therefore not subject to collateral attack.—*State ex rel. Smith v. District Court*, 602.

**Default Judgments—Defendant in Military Service—Jurisdiction.**

15. Failure of plaintiff to file the affidavit required by Chapter 8, Laws Extra Session, 15th Legislative Assembly, page 17, showing that defendant in default was not, at the time of the entry of judgment, in military service, did not affect the jurisdiction of the court to render the judgment and order it entered; omission to file was no more than an irregularity within jurisdiction.—*State ex rel. Smith v. District Court*, 602.

**Same—Defendant in Military Service—Affidavit of Plaintiff—Purpose of Act.**

16. *Held*, that the purpose of section 4 (a) *et seq.* of Chapter 8, *supra* (paragraph 15), is to delay entry of judgment in any case where defendant has defaulted, until the court has taken such measures and made such requirements of the plaintiffs as will furnish the defendant

with protection against the enforcement of a judgment which may injuriously affect him or his interests while he is absent in military service.—*State ex rel. Smith v. District Court*, 602.

## JUDICIAL SALES.

See, also, *Receivers*, 1-4.

## Nature of Transaction.

1. In every judicial sale the court itself is the vendor, and the officer executing the power, whether receiver, trustee or master in chancery, is a ministerial agent.—*Interior Securities Co. v. Campbell, Receiver*, 459.

*Caveat Emptor.*

2. In judicial sales, the rule of *caveat emptor* applies in its utmost vigor.—*Interior Securities Co. v. Campbell, Receiver*, 459.

## JURISDICTION.

Of district courts,—see *District Courts*, 1, 2; *Judgments*, 10-17.

Of city council to order special improvements,—see *Cities and Towns*, 14-22, 26, 27, 30.

## JURY.

See, also, *Instructions*.

Invasion of province of—By court,—see *Criminal Law*, 46.

Questions for,—see *Criminal Law*, 18; *Husband and Wife*, 6.

## Criminal Law—Admonishing Jury—"Jury."

1. Until the jury in a criminal cause is completed and sworn, it is not a "jury" within the meaning of section 9301, which requires the trial judge to admonish the jury at each adjournment not to form or express an opinion upon the case until final submission to them.—*State v. Hall*, 182.

## Same—Admonishing Jury—Record Imports Verity.

2. The record on appeal in a criminal cause which disclosed that when an adjournment was taken, "the jury was admonished by the court and placed in charge of the sheriff," etc., was sufficient to disclose compliance with section 9301, Revised Codes, imported verity and could not be impeached by affidavit.—*State v. Hall*, 182.

## Same—Admonishing Jury—Curing Error.

3. Failure of the court to admonish the jury not to form or express any opinion about the merits of the case upon taking an adjournment after the jury had been sworn, was cured by proper admonitions at every subsequent adjournment.—*State v. Hall*, 182.

## Equity—Jury Trial—Special Findings—General Verdict.

4. Where a jury is called in an equity case to assist in the determination of controverted questions of fact, the trial judge should not submit a general verdict to them, but require them to make special findings in response to interrogatories propounded.—*Wilcox v. Schissler*, 246.

## Homicide—When Excusable—Jury Question.

5. The question whether defendant while intoxicated and in the act of exhibiting his revolver to the deceased, also under the influence of liquor, exercised that usual and ordinary caution in handling the weapon made necessary by section 8299, Revised Codes, to render the killing excusable, was a question for the jury.—*State v. Kuun*, 436.

## Same—Manslaughter—Defendant's Guilt—Withdrawing Question from Jury—Erroneous Refusal.

6. Where the state's evidence made out only a case of manslaughter it was error to refuse defendant's request to withdraw from jury the question whether the evidence made out a case of murder.—*State v. Kuun*, 436.

## LACHES.

## Promissory Notes—Action.

1. Where an action on a note is brought within the period of the statute of limitations, the defense of laches has no merit.—*First State Bank of Hilger v. Lang*, 146.

*Mandamus.*

2. Where a party made repeated efforts, covering a period of about eighteen months, to have a bill of exceptions and statement of the case settled and his motion for new trial disposed of, he was not, on his application for writ of *mandamus* to compel action by the district judge, chargeable with laches.—*State ex rel. Brown v. District Court*, 158.

## LANDLORD AND TENANT.

## Tenant by Sufferance—Definition.

1. A tenant by sufferance is one who, as the result of the owner's neglect or laches, wrongfully remains in occupancy after his right to possession has ended.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

## Tenant at Will—Title to Crops.

2. A tenant at will, being rightfully in possession with the landlord's or owner's express or implied consent, may, unless he holds over wrongfully, at the end of his tenancy, harvest the crops sown and cultivated by him during his occupancy.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

## Tenant by Sufferance—Title to Crops.

3. The crops which a tenant by sufferance (or a trespasser) plants, cultivates and harvests during his wrongful occupancy are his as against the person entitled to possession of the land.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

## Same—Tenant at Will—Liability for Rent.

4. A tenant at will who has made use of lands by planting and harvesting crops, is liable for rent; and a tenant by sufferance who has done likewise must respond in a sum equal to the value of their use and occupation during his wrongful possession of them.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

## Improvements by Tenant—Compensation by Landlord—Rule.

5. It is the general rule that in the absence of a special agreement to that effect, a tenant cannot, by erecting buildings or making other improvements upon leased property, impose upon the landlord the burden of making compensation for such improvements.—*McKeen v. Brooks*, 483.

## Leases—Sale of Premises—Disturbing Possession—Damages—Liability.

6. Where a lease reserved in the lessor the right to sell the property before the end of the term, but provided that if the lessees should be disturbed in their possession "on account of said sale," the lessor should reimburse them for the original cost of improvements made by them, the contract held to have contemplated a disturbance of the lessees' possession by reason of a sale made under such circumstances that the purchaser might rightfully demand possession before the expiration of the term, and not one based upon a wrongful act of the purchaser.—*McKeen v. Brooks*, 483.

## Same—Sale of Leased Property—Right to Possession.

7. In the absence of an agreement to the contrary, a purchaser of realty held by another under an unexpired lease is not entitled to immediate possession, if he had actual or constructive knowledge of the lease at the time of his purchase.—*McKeen v. Brooks*, 483.

## Same—Sale of Property—Rights of Lessees—Constructive Notice.

8. A purchaser of real property which was then in the actual possession of lessees, was charged with knowledge of any interest which they could establish.—*McKeen v. Brooks*, 483.

**Same—Sale of Property—Possession—Rights of Tenants.**

9. Where a purchaser of real property had both actual and constructive notice of an unexpired lease of the premises, and there was no agreement between him and the seller for possession prior to the expiration of the term, he was not entitled to demand possession and the lessees were not required to obey his notice to quit, but could maintain an action for damages against anyone who invaded their possession.—*McKeen v. Brooks*, 483.

**Same—Sale of Premises—Wrongful Demand for Possession—Effect.**

10. A landlord was not answerable in damages to his tenants under a contract of lease which provided that if they were disturbed in their possession on account of a sale of the premises, he would reimburse them for certain improvements made by them, where, after a sale subject to the rights of the tenants under the lease, the purchaser, without the landlord's knowledge or sanction wrongfully demanded, and the tenants mistakenly surrendered, possession.—*McKeen v. Brooks*, 483.

**LARCENY.**

See Criminal Law, 26-29.

**LAW OF CASE.**

See Appeal and Error, 19.

**LEASES.**

Removal of building held under lease—Injunction,—see Real Property, 11-17.

Sale of leased property by lessor—Effect,—see Landlord and Tenant, 5-10.

Real Property—Lease of Building—Implied Inclusion of Land.

1. Where the owner of land leases a building for a term of years without expressly including the land, he thereby demises the latter unless the contrary intention is manifest.—*Wheeler v. McIntyre*, 295.

Same—Lease for Years—Nature of Estate.

2. A lease for years is a chattel real, both under section 4485, Revised Codes, and the common law.—*Wheeler v. McIntyre*, 295.

**LEGISLATURE.**

Election Contest—Compensation—*Mandamus*.

1. After relator had taken the oath of office as a member of the house of representatives, and had participated in the organization of the house and subsequent proceedings therein, a contest of his election was instituted. Hearing of the contest was deferred until a proper presentation of contestants' evidence, and a resolution adopted by the house declaring relator entitled to a seat until determination of the contest, and calling upon the sergeant-at-arms to certify relator's name to the state auditor upon the payrolls of the house. The auditor declined to issue a warrant in payment of relator's compensation. *Held*, on *mandamus*, that the resolution was sufficient evidence of a determination by the house that the relator was a *de jure* member until such time as it might determine otherwise, and was therefore entitled to compensation as such. (MR. CHIEF JUSTICE BRANTLY dissenting.)—*State ex rel. Boulware v. Porter*, 471.

Right to Seat—How and by Whom Determinable.

2. Each house of the legislative assembly is by the Constitution clothed with plenary and exclusive authority to determine for itself, and in its own way, whether a person who presents himself for membership is entitled to a seat, and each member, after seated, holds his office at the

will and pleasure of the house to which he belongs, its authority in this respect being a continuing one running throughout the term for which he is elected.—*State ex rel. Boulware v. Porter*, 471.

#### LICENSE.

##### Definition.

1. A license does not imply an interest in real estate, is a mere personal privilege which, so long as it is executory, may be revoked at the will of the licensor, and may rest in parol.—*Babcock v. Gregg*, 317.

#### LICENSE FEES.

Fees payable by corporations,—see *Taxation*. 1-5.

#### LIENS.

Assessment for special improvements,—see *Cities and Towns*, 22.

#### LIMITATION OF ACTIONS.

See *Statutes of Limitation*.

#### MALICE.

Ratification of malicious act of agent by principal,—see *Principal and Agent*, 2.

Reducing homicide to degree of manslaughter—Absence of malice,—see *Criminal Law*, 56.

Innkeepers—Ejection of Guest—Malice of Agent—Liability of Principal.

1. *Held*, under the rule that a principal is not accountable for the malignant motives of his agent unless he authorized the act for which recovery is sought, participated in its commission or subsequently ratified it, that a hotel-keeper who was not present, took no part in nor subsequently ratified his wife's wrongful act in ejecting a guest from the house, was not liable in exemplary damages, since the malice of his wife was not imputable to him.—*Jones v. Shannon*, 225.

#### MANDAMUS.

See, also, *Elections*, 2-5; *New Trial*, 2-5.

Compensation of legislators,—see *Legislature*, 1, 2.

Demurrer—Motion to Quash—Admissions.

1. A demurrer and motion to quash admit as true the allegations of the affidavit upon which an application for writ of mandate is based.—*State ex rel. Lease v. Wilkinson, Mayor*, 340.

Police Officer—Wrongful Dismissal—Affidavit—Sufficiency.

2. *Held*, that an affidavit setting forth that relator was a duly appointed, qualified and acting policeman of a city of the first class, dismissed from office without any charges having been made against him and without notice of trial, in violation of the Metropolitan Police Law, stated facts sufficient, if proved, to entitle relator to a writ of mandate to compel his reinstatement and therefore dismissal of the proceeding on demurrer and motion to quash was error.—*State ex rel. Lease v. Wilkinson, Mayor*, 340.

#### MANSLAUGHTER.

See *Criminal Law*, 54-57.



## MASTER AND SERVANT.

See Personal Injuries; Workmen's Compensation.

## METROPOLITAN POLICE LAW.

Police officers—Unlawful dismissal,—see Mandamus, 2.

## MINES AND MINING.

See, also, Nuisances, 3-5.

Mining Claims—Failure of Prior Location—Effect on Junior Location.

1. A prior location of a quartz lode mining claim which thereafter fails does not so absolutely withdraw the land covered by it from entry as to defeat a valid junior location of the same ground.—Walsh v. Kleinschmidt, 57.

Same—Abandonment—What may Constitute.

2. Where the prior locators of a mining claim agreed with a junior locator that the latter might make entry of the same ground on condition that they should have a one-fourth interest in the new location as well as a right of tunnel site thereon, the effect of such agreement was the abandonment by them of their claim or the yielding of precedence to the junior locator.—Walsh v. Kleinschmidt, 57.

Quartz Mining—When Nuisance.

3. A business otherwise lawful and useful, such as mining, may become a nuisance by reason of its location or the manner in which it is being conducted.—Cavanaugh v. Corbin Copper Co., 173.

Same—Nuisances—What not Defense.

4. Where mining operations constitute a nuisance, it is no defense that they were carried on according to approved methods, that due care was exercised, or that mining is necessary to the industrial life of the particular district.—Cavanaugh v. Corbin Copper Co., 173.

## MINORS.

See Infants.

## MORTGAGES.

Foreclosure sales—Specific performance,—see Receivers, 1-4; Specific Performance, 1-6.

Foreclosure—Fraud,—see Fraud, 3-6.

Crops—Chattels Personal.

1. Crops of wheat, oats, etc., are emblements—*fructus industriales*—and as such are usually treated as chattels personal, subject to sale or mortgage, and the levy of attachment or execution, even while still annexed to the soil.—Power Mercantile Co. v. Moore Mercantile Co., 401.

Same—Not Real Property.

2. Crops of the character above mentioned are not included within the definition of "real property" declared by sections 4424-4429, Revised Codes, because attached to land by roots, or incidental or appurtenant to it.—Power Mercantile Co. v. Moore Mercantile Co., 401.

Same—Sale of Realty—Effect.

3. Where the owner of land sells it with right of immediate possession in the purchaser and without reservation of the crops then standing thereon, and the purchaser takes possession before severance, title to the crops passes with title to the land.—Power Mercantile Co. v. Moore Mercantile Co., 401.

Same—Tenant by Sufferance—Title to Crops.

4. The crops which a tenant by sufferance (or a trespasser) plants, cultivates and harvests, during his wrongful occupancy are his as

against the person entitled to possession of the land.—*Power Mercantile Co. v. Moore Mercantile Co.*, 401.

Same—Tenant at Will—Title to Crop.

5. A tenant at will, being rightfully in possession with the landlord's or owner's express or implied consent, may, unless he holds over wrongfully, at the end of his tenancy harvest the crops sown and cultivated by him during his occupancy.—*Power Mercantile Co. v. Moore Mercantile Co.*, 401.

Same—Mortgagor Holding Over—Title to Crops.

6. Where a mortgagor of farm lands sold on foreclosure holds over after the expiration of the period of redemption and the issuance of the sheriff's deed, he becomes a tenant by sufferance and as such owns the crops planted, cultivated and harvested by him while in possession of the lands.—*Power Mercantile Co. v. Moore Mercantile Co.*, 401.

#### MOTIONS.

To quash—Application for writ of mandate—Effect,—see *Mandamus*, 2.

#### MOTIVES.

See *Criminal Law*, 18; *Innkeepers*, 6.

#### MUNICIPAL CORPORATIONS.

See *Cities and Towns*.

#### MURDER.

See *Criminal Law*, 1-25, 50-58.

#### NEGLIGENCE.

See *Personal Injuries*.

#### NEGOTIABLE INSTRUMENTS.

See *Bills and Notes*.

#### NEW TRIAL.

Newly discovered evidence,—see, also, *Criminal Law*, 20-25.

Newly Discovered Evidence—Rule.

1. Motions for new trial of criminal cases because of newly discovered evidence are not favored; in passing on them the courts are bound by the rules that the new evidence must have come to the knowledge of the applicant after trial; that failure to discover it sooner was not due to want of diligence; that it is so material that it would probably produce a different result upon another trial; that it is not cumulative merely; that the application must be supported by the affidavit of the witness; that the evidence must not be such as will tend only to impeach the character or credibility of a witness, and that it will likely be available on another trial.—*State v. Van Laningham*, 17.

Entry of Judgment—Notice—Waiver.

2. The party intending to move for a new trial may waive formal notice of entry of judgment and serve his notice of intention without it.—*State ex rel. Brown v. District Court*, 158.

Same—Notice of Intention—Timely Service.

3. Section 6796, Revised Codes, requires that service and filing of a notice of intention to move for a new trial shall be made *after* entry of judgment. A judgment was lodged with the clerk of the district court on the 22d of the month but not entered in the judgment book

until the 23d. Held, on application for writ of mandate to compel settlement of a bill of exceptions, that a notice served and filed the 23d and before actual entry of the judgment was not ineffectual.—State ex rel. Brown v. District Court, 158.

**Time—Fractions of Day—To be Disregarded, When.**

4. In passing upon a motion for a new trial where the only question raised by the prevailing party in opposition has to do with the regularity of procedural steps taken by the moving party, courts should disregard fractions of a day.—State ex rel. Brown v. District Court, 158.

**Mandamus—Laches.**

5. Where a party made repeated efforts, covering a period of about eighteen months, to have a bill of exceptions and statement of the case settled and his motion for new trial disposed of, he was not, on his application for writ of *mandamus* to compel action by the district judge, chargeable with laches.—State ex rel. Brown v. District Court, 158.

**Review—Discretion.**

6. In no case will the conclusion of the district court in disposing of a motion for a new trial be revised on appeal, except for manifest abuse of its discretion.—Jones v. Shannon, 225.

**Disposition of Motion by New Judge—Effect.**

7. Where a motion for a new trial is disposed of by a judge other than the one who presided at the trial, the question on appeal is not whether the judge was guilty of abuse of his discretion in denying it, but whether the evidence as presented in the printed record preponderates decisively against the verdict.—Jones v. Shannon, 225.

**Discretion.**

8. Held, that the trial court was not guilty of abuse of discretion in granting a new trial for insufficiency of the evidence to justify a verdict.—J. I. Case Threshing Machine Co. v. Hamilton, 276.

**Disregard of Instruction by Jury.**

9. Where the jury has disregarded a specific instruction, the supreme court will not inquire whether it is correct in point of law, but will direct a new trial, unless affirmance is required under section 7118, Revised Codes, prohibiting reversal where the proper result was reached notwithstanding the error committed.—De Young v. Benepe, 306.

**Injunction—Findings—Review of Evidence.**

10. The question of the sufficiency of the evidence to support the findings of the court in a suit for an injunction may be raised on appeal from the order denying a new trial.—Babcock v. Gregg, 317.

**Setting Aside Order—Showing Necessary.**

11. It is only upon a very strong showing that the supreme court will on appeal set aside an order granting a new trial.—State v. Schoenborn, 517.

**Criminal Law—Appeal—Extent of Review.**

12. Where, on appeal by the state from an order granting defendant a new trial on the ground that the verdict returned was contrary to the evidence, it appears that the judge who tried the cause also granted the motion, the supreme court is limited in its review to an examination of the record to ascertain whether there is a substantial conflict in the evidence, or an absence of evidence necessary to make out a case.—State v. Schoenborn, 517.

**Same—Appeal and Error—Duty of Appellant.**

13. An order granting a new trial to defendant in a criminal cause made by a district judge other than the one who tried it, on the ground that the verdict was contrary to the evidence, required a determination

of the weight of the evidence—an exercise of judicial function—and the burden of showing that the district judge could not, in the exercise of sound judgment, conclude from the record that the evidence was insufficient to justify the verdict was upon the state.—*State v. Schoenborn*, 517.

**Same—When Defendant Entitled to Retrial.**

14. To secure a new trial a convicted defendant in a criminal case is not required to show an entire absence of evidence of some fact necessary to make out a case; if he can convince the district court that the evidence in its entirety is insufficient in weight to justify the verdict, he is entitled to a retrial.—*State v. Schoenborn*, 517.

**Formal Notice not Required.**

15. A formal notice for a new trial is not required under the Montana new trial procedure, the notice of intention performing the function of such notice.—*Lish v. Martin*, 582.

**Notice of Intention—Record on Appeal—Presumptions.**

16. In the absence of a showing of lack of notice in the appellants of the hearing of a motion for a new trial granted respondent, it will be presumed that the proceedings were regular and that they had notice.—*Lish v. Martin*, 582.

**Failure to Give Notice—Review of Error—Duty of Appellant.**

17. Where a motion for a new trial was heard and granted without notice to the adverse party, it was incumbent upon him to move the trial court to vacate the order as improvidently made, supporting the motion by affidavit showing that notice of the hearing was not given. *Lish v. Martin*, 582.

**Pleadings—Sufficiency—New Trial Order—Review.**

18. The sufficiency of a complaint not drawn in question in any way during trial could not be considered by the district court on the hearing of the motion for a new trial, and may not be passed upon by the supreme court on appeal from the order denying it; its sufficiency being reviewable only on appeal from the judgment.—*Glendenning v. Slayton*, 586.

**How to be Granted.**

19. A new trial can be granted only in the manner, within the time and upon the grounds provided in the statute.—*State ex rel. Smith v. District Court*, 602.

**When Unauthorized.**

20. The district court has no authority to grant a new trial upon its own motion.—*State ex rel. Smith v. District Court*, 602.

**Judgments—Amendments—Granting on Court's Own Motion—New Trial.**

21. *Held*, on *certiorari*, that the district court was without power to so amend its order granting a decree of divorce after rendition and signing thereof, as in effect to award a new trial, on its own motion, on the ground of newly discovered evidence which "came to the knowledge of the court *ex parte*."—*State ex rel. Smith v. District Court*, 602.

**NONSUIT.**

**When Improper.**

1. The admission in defendant administrator's answer that part of plaintiff's claim against decedent's estate was justly due and had been allowed by him, entitled plaintiff to judgment in that amount at least, in his action against the estate, and a nonsuit was therefore improper. *Roy v. King's Estate*, 567.

NOTICE.

- Entry of judgment—Waiver,—see New Trial, 2.  
 Of intention,—see New Trial, 3, 15.  
 Possession of land—Constructive notice,—see Real Property, 7, 8, 24.  
 Recordation of instruments—When not constructive notice,—see Real Property, 6.  
 Special improvements,—see Cities and Towns, 17, 28-32.  
 Special election—Failure to publish,—see Elections, 1.

NUISANCES.

What may and What Does not Constitute.

1. While, under section 6162, Revised Codes, defining a private nuisance, a legitimate and useful business or occupation cannot be suppressed on account of a trivial annoyance, one may not be driven from his home or compelled to live in positive discomfort in order to accommodate another in the pursuit of a business which offends the mind and taste of the average person.—Cavanaugh v. Corbin Copper Co., 173.

Quartz Mining.

2. A business otherwise lawful and useful, such as mining, may become a nuisance by reason of its location or the manner in which it is being conducted.—Cavanaugh v. Corbin Copper Co., 173.

Same—What are not Defenses.

3. Where mining operations constitute a nuisance, it is no defense that they were carried on according to approved methods, that due care was exercised, or that mining is necessary to the industrial life of the particular district.—Cavanaugh v. Corbin Copper Co., 173.

Same—Evidence—Sufficiency.

4. Evidence held sufficient to warrant a finding that quartz mining operations carried on in a residential portion of a city constituted a private nuisance within the meaning of section 6162, Revised Codes. Cavanaugh v. Corbin Copper Co., 173.

Same—City Property—Reservation of Minerals—Estoppel.

5. Where the minerals underneath a city addition were reserved to the grantor in a deed to lots sold for residence purposes, with the right to mine the same, provided that in the exercise of such right the occupant of the surface should not be disturbed, damaged or interfered with in its use and enjoyment, the purchaser was not estopped to complain of the manner in which mining was being carried on.—Cavanaugh v. Corbin Copper Co., 173.

OFFER OF PROOF.

When unnecessary,—see Appeal and Error, 9.

OFFICE AND OFFICERS.

State auditor—Holding two offices,—see Workmen's Compensation, 8.

Compensation—Burden of Proof.

1. Emoluments follow the legal title to an office; hence one who seeks to enforce payment of compensation attached to an office has the burden of showing that he is in right as well as in fact the officer he claims to be.—State ex rel. Boulware v. Porter, 471.

OPTIONS.

Breach—Measure of damages,—see Real Property, 1-3.

Contract to purchase property, not a "credit,"—see Taxation, 23.

## ORDERS.

Nonappealable,—see Appeal and Error, 34.

Special order after final judgment,—When appealable,—see Appeal and Error, 35.

## PARENT AND CHILD.

Posthumous children—Rights,—see Descent and Distribution.

## PARTNERSHIP.

Recovery of Partnership Assets—Complaint.

1. Complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner, *held* insufficient, under section 7607, Revised Codes, for failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession.—*Silver v. Eakins, Executrix*, 210.

Action Against Partner—Rule.

2. The rule that one partner cannot maintain an action at law against his copartner until an accounting is had and a balance determined ceases upon the death of one of them.—*Silver v. Eakins, Executrix*, 210.

Death of Partner—Rights of Surviving Partner.

3. Upon the death of one partner, the partnership is dissolved, and the surviving partner is at once entitled to the possession of sufficient firm property to discharge its debts, and, if necessary for that purpose, to maintain an action for money had and received to recover firm assets from the estate of the deceased partner.—*Silver v. Eakins, Executrix*, 210.

Same—Rights of Surviving Partner.

4. The failure of a surviving partner to give the bond required by section 7607, Revised Codes, did not affect his right to the possession of the firm property, or defeat his right to maintain any appropriate action concerning it.—*Silver v. Eakins, Executrix*, 210.

Elements of—Evidence—Sufficiency.

5. To establish the existence of a partnership it is not necessary that its elements should be made to appear by direct evidence; if the jury could, from the evidence before them, draw the legitimate inferences required to complete proof of its existence, it was sufficient.—*Silver v. Eakins, Executrix*, 210.

## PAYMENT.

Burden of proof,—see Principal and Agent, 3.

Taking second-hand machinery as part payment,—see Principal and Agent, 6.

Wrongful delivery of receipt by trustee not evidence of payment,—see Trusts, 3.

Contracts—Place of Payment—Statute.

1. Where a contract is silent as to the place of payment, the law imports into and makes a part of it by implication a provision that the debtor must, in order to perform his obligation, pay or tender payment to the creditor where the latter may then reside or conduct business or be found. (Rev. Codes, secs. 4932, 4933.)—*State ex rel. Western A. & I. Co. v. District Court*, 330.

## PERJURY.

Disbarment,—see Attorney and Client, 1, 2.

PERSONAL INJURIES.

See, also, Workmen's Compensation.

**Master and Servant—Insufficient Number of Employees—Burden of Proof.**

1. In an action by a laborer against his employer for negligent failure to detail a sufficient number of men to move a heavy plate, resulting in its fall and plaintiff's injury, the burden was upon the latter to show that the negligence alleged was the proximate cause of his injury.—*Markinovich v. Northern Pacific Ry. Co.*, 139.

**Same—Proximate Cause—Failure of Proof.**

2. Plaintiff, a laborer, with four others, was directed to move a steel plate weighing 600 pounds, three being in front with their backs to it and plaintiff and another behind, facing it; in going up a slight incline, the men behind failed to push it forward; the plate slipped out of the hands of the men in front and injured plaintiff. The evidence showed that the plate was not too heavy for five men to carry. *Held*, that the proximate cause of the injury was not the excessive weight of the plate—as charged by plaintiff—but the clumsy method in handling it employed by him and his coemployees.—*Markinovich v. Northern Pacific Ry. Co.*, 139.

**Same—Manner of Doing Work—Master's Liability.**

3. The master is not responsible for injuries to his servants which result proximately from the manner in which they perform a task allotted to them, this being a matter of detail which he may rightly leave to their judgment and discretion.—*Markinovich v. Northern Pacific Ry. Co.*, 139.

**Same—Master not Insurer—Erroneous Instruction.**

4. An unqualified instruction that it was the duty of defendant to provide a sufficient number of men to perform the task in hand was erroneous, as constituting the master an absolute insurer of the safety of his servant.—*Markinovich v. Northern Pacific Ry. Co.*, 139.

**Minors—Contributory Negligence—Automobiles.**

5. *Held*, under the rule that after a child has reached the age of fourteen years he is presumed capable of contributory negligence, that a minor within a few months of majority who had supported himself since he was fifteen years old doing farm work and acting as a chauffeur, could properly be charged with such negligence in his action for personal injuries sustained in an automobile accident while riding in the machine as the guest of the driver.—*Sherris v. Northern Pacific Ry. Co.*, 189.

**Imputed Negligence—Automobiles.**

6. *Quære*: Where personal injury is suffered by one riding in an automobile as the guest of the driver, is the negligence of the latter, who does not sustain the relation of employee or agent to the former, imputable to the guest?—*Sherris v. Northern Pacific Ry. Co.*, 189.

**Duty to Avoid Danger—Contributory Negligence.**

7. Every person is bound to an absolute duty to exercise his intelligence to discover and avoid dangers that may threaten him because of the culpable negligence of another, and therefore plaintiff in a personal injury action based on such negligence must show that he did so exercise his intelligence at the time of the accident.—*Sherris v. Northern Pacific Ry. Co.*, 189.

**Railroad Crossings—Automobiles—Guest of Driver—Contributory Negligence.**

8. Plaintiff who, as the guest of the driver of an automobile, was riding on the front seat of the machine when approaching a railroad crossing, was required to exercise his intelligence to avoid the dan-

gers incident thereto, and could not blindly rely upon the unaided care and vigilance of the driver for his safety without assuming the consequences of his negligence.—*Sherris v. Northern Pac. Ry. Co.*, 189.

**Imputed Negligence—Instructions—Harmless Error.**

9. Where the jury properly found that plaintiff was guilty of contributory negligence and therefore could not recover damages, the giving of an erroneous instruction touching the doctrine of imputed negligence was nonprejudicial.—*Sherris v. Northern Pac. Ry. Co.*, 189.

***Res Ipsa Loquitur*—Inapplicability of Doctrine.**

10. The doctrine of *res ipsa loquitur* held inapplicable in an action by a laborer injured by the fall of a brick upon his foot while engaged in moving a wheelbarrow load of bricks from a freight-car to a building in course of construction.—*Matti v. Chicago, Milwaukee & St. Paul Ry. Co.*, 280.

**Federal Employers' Liability Act—Interstate Commerce—Burden of Proof.**

11. In order to make out a *prima facie* case, where recovery for a personal injury is sought under the federal Employers' Liability Act, plaintiff has the burden of proving that at the time of the accident he was employed in interstate commerce.—*Matti v. Chicago, Milwaukee & St. Paul Ry. Co.*, 280.

**Same—Construction—Federal Question.**

12. The construction of the federal Employers' Liability Act involves a federal question, with respect to which the decisions of the United States supreme court are conclusive upon state courts.—*Matti v. Chicago, Milwaukee & St. Paul Ry. Co.*, 280.

**Same—Evidence—Insufficiency.**

13. *Held*, that a laborer employed in loading bricks from a railroad car into a wheelbarrow and moving them to a freight terminal being erected by defendant railway company for use in connection with a line of road in course of construction but not completed and not put to use until several months after the accident was not engaged in interstate commerce and was therefore not entitled to recover under the federal Employers' Liability Act for an injury to his foot caused by bricks falling upon it.—*Matti v. Chicago, Milwaukee & St. Paul Ry. Co.*, 280.

**Common-law Rules—Legislature may Abolish.**

14. No one has a vested right in any rule of the common law; and the technical defenses recognized by it in personal injury actions, such as contributory negligence, assumption of risk, *etc.*, as well as technical rights of action arising out of the negligence of the employer, may be abolished or modified by the legislature without transgressing any constitutional guaranty.—*Shea v. North-Butte Mining Co.*, 522.

**Right of Action—Power of Legislature.**

15. The legislature cannot destroy vested rights; therefore where an injury has occurred for which the injured person has a right of action, the legislature cannot deny him a remedy.—*Shea v. North-Butte Mining Co.*, 522.

PLEADING AND PRACTICE.

**Unpaid Stock Subscriptions—Action to Recover—Complaint.**

1. The complaint in an action by a corporation to recover an unpaid stock subscription is fatally defective if it does not disclose that all



the capital stock has been subscribed.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Same—Complaint—Insufficiency.**

2. The allegation that plaintiff was duly incorporated under the laws of the state by the subscribers to the subscription contract in pursuance of the terms thereof was not a sufficient averment that all the conditions of the contract had been fulfilled, but meant only that the corporation had gained a legal status to commence business if all the stock had been subscribed, or, if not, to solicit subscribers or sell shares.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Contracts—Conditions Precedent—Pleading.**

3. In declaring upon a contract containing conditions precedent, a party may, under section 6572, Revised Codes, allege generally that he has performed all the conditions on his part, provided he couch the allegation in the terms of the statute or in terms equivalent thereto.—*Enterprise Sheet Metal Works v. Schendel*, 42.

**Quieting Title—Pleadings—When Deemed Amended.**

4. In a suit to quiet title to a mining claim in the trial of which evidence was presented touching a matter not pleaded and which was permitted to go to submission as though a well-defined issue had been made as to it, the pleadings will on appeal be considered as amended to conform to the proof and the findings made thereon accepted as though stating the established facts.—*Walsh v. Kleinschmidt*, 57.

**Contracts—Fraud—Damages—Complaint—Sufficiency.**

5. To state a cause of action for rescission of a contract for fraud, plaintiff need not allege that he suffered pecuniary loss, the statement that he suffered damage or injury being sufficient.—*Stillwell v. Rankin*, 130.

**Same.**

6. Allegations that plaintiff was induced by defendant's fraudulent representations to assume obligations which otherwise he would not have assumed and to purchase property he would not have bought but for such representations were sufficient to disclose damage within the meaning of paragraph 5 above.—*Stillwell v. Rankin*, 130.

**Partnership—Recovery of Partnership Assets—Complaint.**

7. Complaint in an action by a surviving partner to recover partnership property from the estate of the deceased partner, *held* insufficient, under section 7607, Revised Codes, for failure to disclose the amount of the firm's debts, if any, or the amount or value of its assets in plaintiff's possession.—*Silver v. Eakins*, 210.

**Quieting Title—Complaint—Contents.**

8. To state a good cause of action in a suit to quiet title, plaintiff must allege either possession by himself or the fact that the land in question is unoccupied.—*Lee v. Laughery*, 238.

**Removal of County Seat—Petition—Sufficiency—Test.**

9. *Held*, under section 2852, Revised Codes, that the board of county commissioners is limited in its investigation of the sufficiency of a petition for the removal of the county seat to a comparison of the names appearing thereon with the poll-books to ascertain whether the signers are voters, and with the assessment-roll, whether they are taxpayers, and may not, therefore, eliminate from the petition names of persons who have ceased to be legal voters or taxpayers.—*Ainsworth v. McKay*, 270.

**Injunction—Leases—Sale of Land—Removal of Building—Complaint—Sufficiency.**

10. Complaint in an action by the assignee of a lease of a building used for business purposes, the lease being for a term of years still

existing, to enjoin the owner thereof from moving it to another site, *held* sufficient to withstand a general demurrer.—*Wheeler v. McIntyre*, 295.

**Same—Complaint—Unnecessary Allegations.**

11. To entitle the assignee of a lease for years to an injunction against the removal of the building in which he conducts business, he need not show that the threatened wrong would, if committed, interfere with or destroy his business or that defendant is unable to answer in damages.—*Wheeler v. McIntyre*, 295.

**Same — Ditches — Interference — Injunction — Title—Complaint—Surplusage.**

12. In a suit for an injunction to restrain interference with an irrigating ditch and to compel removal of an obstruction placed therein by defendant, plaintiff need not plead the character of title by which he holds the right of way for his ditch; where he does so, the allegation may be treated as surplusage.—*Babcock v. Gregg*, 317.

**Same—Pleading—Surplusage—Appeal—Theory of Case.**

13. Plaintiff's allegation that he acquired title to a ditch by prescription having been surplusage, he was not estopped, on the ground of inconsistency, to assert on appeal that he obtained title by exchange of one ditch for another.—*Babcock v. Gregg*, 317.

**Mandamus—Demurrer—Motion to Quash—Admissions.**

14. A demurrer and motion to quash admit as true the allegations of the affidavit upon which an application for writ of mandate is based.—*State ex rel. Lease v. Wilkinson, Mayor*, 340.

**Same—Police Officer—Wrongful Dismissal—Affidavit—Sufficiency.**

15. *Held*, that an affidavit setting forth that relator was a duly appointed, qualified and acting policeman of a city of the first class, dismissed from office without any charges having been made against him and without notice of trial, in violation of the Metropolitan Police Law, stated facts sufficient, if proved, to entitle relator to a writ of mandate to compel his reinstatement and therefore dismissal of the proceeding on demurrer and motion to quash was error.—*State ex rel. Lease v. Wilkinson, Mayor*, 340.

**Causes of Action—Failure to Separately State and Number—Remedy.**

16. Where several causes of action are not separately stated and numbered, as required by Revised Codes, section 6533, the remedy is not by demurrer, but by motion to make definite and certain.—*Roberts v. Sinnott*, 369.

**Pleading—Incompatible Theories.**

17. A party may in his complaint present his claim to the use of irrigating ditches in different counts, each founded upon a different theory to meet the exigencies of the case as disclosed by the evidence, provided the theories are not incompatible.—*Lowry v. Carrier*, 392.

**Same—Adverse Possession—Prescription—Incompatible Theories.**

18. Since use of one's own property cannot be "adverse" within the meaning of that term as used in the law of prescription, assertion of title to an easement over public lands granted by the federal government under sections 2339 and 2340, United States Revised Statutes, for ditch purposes, and claim of the same right under title by prescription thereafter acquired were incompatible, in the absence of abandonment.—*Lowry v. Carrier*, 392.

**Agreed Statement—Conclusiveness.**

19. An agreed statement of facts voluntarily made and submitted to the trial court is binding upon the party and the court.—*Read v. Lewis and Clark County*, 412.

**Injunction—*Res Adjudicata*—Successive Applications.**

20. Where a husband failed to appeal from an order denying him an injunction against his wife to prevent her from enforcing a judgment she had obtained in a suit for separate maintenance, pending determination of his suit for annulment of the marriage, he was bound by it, and could not thereafter apply for the same relief, upon substantially the same state of facts, either in the suit for annulment or one instituted for the sole purpose of securing an injunction.—*Bown v. Somers*, 434.

**Admissions—Nonsuit—When Improper.**

21. The admission in defendant administrator's answer that part of plaintiff's claim against decedent's estate was justly due and had been allowed by him, entitled plaintiff to judgment in that amount at least, in his action against the estate, and a nonsuit was therefore improper.—*Boy v. King's Estate*, 567.

**POLICE OFFICERS.**

Unlawful dismissal,—see *Mandamus*, 2.

**POSSESSION.**

See, also, *Mortgages*, 1-6.

Of land—Notice of what,—see *Real Property*, 7, 9.

Of land purchased at execution sale,—see *Real Property*, 21.

Wrongful possession of land—Planting and harvesting crops—Damages,—see *Landlord and Tenant*, 4.

**PREFERENCES.**

See *Bankruptcy*, 1-7.

**PRESCRIPTION.**

Acquisition of easement in streets,—see *Cities and Towns*, 23-25.

Title to right of way for ditch,—see *Waters and Water Rights*, 3, 5, 7, 12.

**PRESUMPTIONS.**

**Special Administrators—Official Duty—Abuse of Power—Burden of Proof.**

1. The presumption is that the official duties of a special administrator were regularly performed and that he did not abuse his power; and the burden of showing that profits accrued to him from use of the funds of the estate is upon the objectors who charge wrongful conduct.—*In re Williams' Estate*, 63.

**Cities and Towns—Public Utility Rates—Regulation.**

2. Rate regulation of public utilities is a legislative function of the state, and since the effect of a grant to a city to enter into a contract with a public utility for specific rates for a given period is to extinguish *pro tanto* a governmental power of first importance, the courts will not indulge the presumption that such a surrender of power has been made, but the legislative intention must be expressed in clear and unmistakable language or necessarily implied from the powers expressly granted, before it can be held that the state has precluded itself from the function of rate regulation and control.—*State ex rel. City of Billings v. Billings Gas Co.*, 102.

**Criminal Law—Appeal—Prejudice—Record.**

3. Prejudice to appellant in a criminal cause will not be presumed, but must be made to appear either affirmatively by the

record or by a denial or invasion of a substantial right from which the law imputes prejudice.—*State v. Hall*, 182.

**Taxation—Exemptions.**

4. The taxing power of the state is never presumed to be relinquished; but the intention to relinquish must be expressed in clear and unambiguous terms.—*Cruse v. Fischl*, 258.

**Promissory Notes—Debt.**

5. Where defendant gave his promissory notes to plaintiff at a time when, as alleged in his counterclaim, the latter was indebted to him in a substantial sum, defendant had the burden of rebutting the presumption that they would not have been executed if plaintiff had been indebted to him.—*J. I. Case Threshing Machine Co. v. Hamilton*, 276.

**Bill of Exceptions—Settlement and Certification.**

6. Where the presumption of correctness arising from the settlement and certification of a bill of exceptions is not rebutted, it is conclusive.—*State v. Tate*, 343.

**Instructions—Duty of Jury to Obey.**

7. In the absence of anything to indicate the contrary, it will be assumed on appeal that the jury observed the instructions of the trial court.—*Roberts v. Sinnott*, 369.

**Statutes—Adoption from Other State.**

8. When a statute is adopted from another state, the presumption is that the legislature adopts the interpretation placed upon it by the highest court of the state from which it is adopted.—*Moreland v. Monarch Min. Co.*, 419.

**Homicide—Manslaughter—Malice.**

9. Where the state's evidence tends to show that the homicide committed only amounts to manslaughter, the presumption of malice does not obtain, and the defendant may take advantage of the case as made by the state to reduce the homicide to manslaughter, and refrain from introducing any evidence.—*State v. Kuun*, 436.

**Appeal and Error.**

10. In entering upon its consideration of an appeal, the supreme court indulges the presumption that the judgment or order from which the appeal is taken is correct, the burden being upon appellant to show reversible error.—*State v. Schoenborn*, 517.

**Legislature may Establish.**

11. The legislature may establish presumptions, provided they are not unreasonable.—*Shea v. North-Butte Mining Co.*, 522.

**City Council—Powers.**

12. The city council in proceedings looking to the creation of special improvement districts has only such powers as are conferred upon it by Chapter 89, Laws of 1913, and Chapter 142, Laws of 1915, in that behalf, and therefore no presumption in favor of its jurisdiction can be indulged.—*Johnston v. City of Hardin*, 574.

**New Trial—Notice of Intention—Record on Appeal.**

13. In the absence of a showing of lack of notice in the appellants of the hearing of a motion for a new trial granted respondent, it will be presumed that the proceedings were regular and that they had notice.—*Lish v. Martin*, 582.

PRINCIPAL AND AGENT.

See Banks and Banking, 2-12; Innkeepers, 6.

Torts—Liability.

1. A principal is liable in damages for wrongs done by his agent while in the discharge of the duties intrusted to him by the principal, even though the latter is ignorant of the wrongs.—*Jones v. Shannon*, 225.

Same—Malice of Agent—Ratification by Principal.

2. Unless the principal has knowledge of the circumstances attending a malicious act of his agent, there can be no such ratification of the act as will subject the principal to the imputation of malice.—*Jones v. Shannon*, 225.

Commissions—Payment—Burden of Proof.

3. Where commissions on sales of machinery were claimed under a dealer's contract which provided that commissions were not to become due and payable until the purchase price should have been paid, the burden was upon the party claiming them to show payment.—*J. I. Case Threshing Machine Co. v. Hamilton*, 276.

Same—Account Stated.

4. In an action to recover commissions on sales of farm implements under an agency contract, a "settlement sheet," the debit and credit sides of which apparently balanced and which was signed by plaintiffs, *held*, under the circumstances, not to constitute an account stated, *i. e.*, an agreement that nothing was due them for services performed in making the sales.—*Bjorneby v. Minneapolis Threshing Machine Co.*, 287.

Same—Agency Contract—Modification—Right to Commissions.

5. Sales for less than price list and on terms different from those authorized in the agency contract could not prevent recovery of commissions where the changes in price and terms were directed by defendant under a clause in the contract reserving to itself the right to do so.—*Bjorneby v. Minneapolis Threshing Machine Co.*, 287.

Same—Second-hand Articles Taken as Part Payment.

6. Where sales agents were instructed by their principals to accept a second-hand engine as part payment on new farm implements, the value placed upon the engine by defendant company represented money, on which plaintiffs were entitled to commissions.—*Bjorneby v. Minneapolis Threshing Machine Co.*, 287.

Same—Unpaid Installments.

7. Where an agency agreement provided that commissions on time sales should be due only when the installments were paid to the principal, they could not be recovered upon unpaid installments.—*Bjorneby v. Minneapolis Threshing Machine Co.*, 287.

PROBATE PROCEEDINGS.

See, also, Executors and Administrators; Descent and Distribution; Estates of Deceased Persons.

Decrees—Amendments,—see Judgments, 6.

PROHIBITION ACT.

See Intoxicating Liquors.

PROMISSORY NOTES.

See Bills and Notes.

**REAL PROPERTY.****PUBLIC LANDS.**

Water rights—Easements,—see Waters and Water Rights, 9, 12, 15.

**PUBLIC POLICY.****How Determined.**

1. The public policy of this state is determined by the enactments of the legislature, and, in their absence, by the decisions of the courts.—*Cruse v. Fischl*, 258.

**Waiver of Provision of Law.**

2. One may waive the advantage of any provision of law which was intended for his benefit, so long as the waiver does not violate public policy.—*Shea v. North-Butte Mining Co.*, 522.

**PUBLIC SECURITIES.**

Subject to taxation,—see Taxation, 9-22.

**PUBLIC UTILITIES COMMISSION.**

See Cities and Towns, 1-13.

**QUANTUM MERUIT.****Work and Labor.**

1. One who has fully performed an express agreement for services may sue upon the *quantum meruit*, the limitation of recovery being the stipulated price.—*De Young v. Benepe*, 306.

**Same—Full Performance—Burden of Proof.**

2. Where a purchaser of land, unable to carry out the provisions of his contract, had entered into a special agreement with the vendor, under which he was required to do certain work as well as to surrender the original contract and possession of the land, he was required to show, as a condition precedent to his right to recover on a *quantum meruit*, that he had fully performed in all three particulars.—*De Young v. Benepe*, 306.

**QUIETING TITLE.**

See Pleading and Practice, 4, 8.

**RAILROADS.**

Crossings—Automobile accident,—see Personal Injuries, 5-9.

Master and servant,—see Personal Injuries, 1-4, 10-13.

Taxation of block-signal system,—see Taxation, 8.

Taxation of electrification system,—see Taxation, 6, 7.

**RATES.**

Public utilities,—see Cities and Towns, 1-13.

**RATIFICATION.**

Of unauthorized act of cashier,—see Banks and Banking, 9-11.

Of malicious act of agent,—see Principal and Agent, 2.

**REAL PROPERTY.**

See, also, Contracts; Landlord and Tenant; Leases.

Easements,—see Easements; Prescription; Waters and Water Rights, 1-5.

**Option Contracts—Value.**

1. The value of an option on land is not in all cases the difference between the value of the land and the face of the option.—*Teagarden v. Calkins*, 35.

**Value of Option—How Measured.**

2. An option is a mere right to purchase upon certain terms, its value depending upon its desirability, as measured by the time it has to run, the terms of payment, the existence of a market for the property, *etc.* *Teagarden v. Calkins*, 35.

**Option—Rights of Joint Holders.**

3. In the absence of fraud, the measure of damages in an action by one of two joint holders of an option on land (about to expire) to recover his share of the value of the option upon sale thereof by the other, *held* under the circumstances to have been one-half the amount the seller actually received and not the difference between the value of the land at the time and the face of the option.—*Teagarden v. Calkins*, 35.

**Brokers—Furnishing Abstract of Title—Duty of Seller.**

4. Defendant listed with plaintiff, a real estate dealer, a town lot for sale on a commission basis, the former agreeing, among other things, to furnish an abstract of title to date of sale. The abstract thus furnished showed two apparent defects in the title, both easily correctible by reference to the original records. Plaintiff found a buyer and demanded of defendant that she correct the abstract and make good the title. *Held*, that the demand to make good the title did not exact of defendant an impossibility not required by the contract.—*Butte Land & Investment Co. v. Williams*, 39.

**Same—Failure to Conclude Sale—Commission.**

5. A real estate broker with whom property is listed for sale on a commission basis is the seller's agent for the purpose of effecting—not defeating—a sale; hence where a broker after discovering a supposed (but not real) defect in the abstract of title advised a prospective purchaser not to buy, after refusal of the owner to correct the abstract at her expense, was not entitled to recover his commission.—*Butte Land & Investment Co. v. Williams*, 39.

**Instruments—Record—When not Notice.**

6. A bill of sale conveying an interest in land which was not acknowledged or proved was not entitled to record under section 4646, Revised Codes, and therefore its record imparted no constructive notice to anyone.—*Baum v. Northern Pac. Ry. Co.*, 219.

**Possession—Notice.**

7. Where the deed under which one holds land is of record and the grantee takes possession, such possession is referable to such deed, and a subsequent purchaser is relieved from further inquiry to ascertain whether any other or different claim is asserted.—*Baum v. Northern Pac. Ry. Co.*, 219.

**Same.**

8. Possession of land does not alone impart actual notice of any claim or right in the party in possession, but is, at most, constructive notice such as arises from the record of a deed, and cannot impart notice of any greater claim than the occupant has.—*Baum v. Northern Pac. Ry. Co.*, 219.

**Deeds—Recordation of Instruments—Constructive Notice.**

9. In order that the record of an instrument shall impart constructive notice, the writing must be one which the law authorizes to be recorded.—*Lee v. Laughery*, 238.

**Deeds—Consideration—Burden of Proof.**

10. A deed to land furnishes presumptive evidence of a consideration, and the burden of showing want of consideration sufficient to support it is upon him who seeks to invalidate it or avoid its effect.—*Lee v. Laughery*, 238.

**Injunction—Leases—Sale of Land—Removal of Building—Complaint—Sufficiency.**

11. Complaint in an action by the assignee of a lease of a building used for business purposes, the lease being for a term of years still existing, to enjoin the owner thereof from moving it to another site, *held* sufficient to withstand a general demurrer.—*Wheeler v. McIntyre*, 295.

**Lease of Building—Implied Inclusion of Land.**

12. Where the owner of land leases a building for a term of years without expressly including the land, he thereby demises the latter unless the contrary intention is manifest.—*Wheeler v. McIntyre*, 295.

**Lease for Years—Nature of Estate.**

13. A lease for years is a chattel real, both under section 4485. Revised Codes, and the common law.—*Wheeler v. McIntyre*, 295.

**Same—Removal of Building—Injunction—Complaint.**

14. To entitle the assignee of a lease for years to an injunction against the removal of the building in which he conducts business, he need not show that the threatened wrong would, if committed, interfere with or destroy his business or that defendant is unable to answer in damages.—*Wheeler v. McIntyre*, 295.

**Same—Injunction—Continuing Trespass—Multiplicity of Actions.**

15. Injunction lies to prevent a multiplicity of actions at law for damages which would be caused by the threatened commission of continuing and repeated trespasses upon plaintiff lessee's estate in the building attempted to be moved to another site.—*Wheeler v. McIntyre*, 295.

**Same—Rights of Lessee.**

16. Knowledge in the assignee prior to taking over a lease of a building that the owner had sold the lot and contemplated removal of the structure to another site before expiration of the lease, could not affect his rights under the lease or deprive him of the right to an injunction restraining removal of the building.—*Wheeler v. McIntyre*, 295.

**Same—Injunction—Doctrine of Comparative Injury.**

17. In determining whether injunction should issue to restrain the threatened removal of a building held under lease, the doctrine of relative or comparative injury and inconvenience should be resorted to only when the party whose rights are threatened with invasion or destruction can be thoroughly protected.—*Wheeler v. McIntyre*, 295.

**Contracts of Sale—Breach by Purchaser—Effect.**

18. Where the vendor of land had exercised his option reserved to him in a contract of sale of land, by ousting the vendee because of failure to make payments as stipulated, the latter was relieved from further payment of taxes, interest, etc., and his refusal to do so could not thereafter be made the basis of an action by the vendor.—*De Young v. Benepe*, 306.

**Easement—Nature of Right Acquired.**

19. An easement implies a permanent interest in real estate, and, generally speaking, can be created only by an instrument in writing or by prescription.—*Babcock v. Gregg*, 317.

**Same—Definition.**

20. A license does not imply an interest in real estate, is a mere personal privilege which, so long as it is executory, may be revoked at the will of the licensor, and may rest in parol.—*Babcock v. Gregg*, 317.

**Execution Sale—Purchaser—Right to Possession.**

21. *Semble*: It would seem that the purchaser of land at execution sale is, as against the execution debtor, entitled to possession during the period of redemption.—*Power Merc. Co. v. Moore Merc. Co.*, 401.



**Crops not Real Property.**

22. Crops, such as wheat, oats, etc., are not included within the definition of "real property" declared by sections 4424-4429, Revised Codes, because attached to land by roots, or incidental or appurtenant to it.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

**Sale—Standing Crops—Ownership—Effect.**

23. Where the owner of land sells it with right of immediate possession in the purchaser and without reservation of the crops then standing thereon, and the purchaser takes possession before severance, title to the crops passes with title to the land.—*Power Merc. Co. v. Moore Merc. Co.*, 401.

**Sale—Rights of Lessees—Constructive Notice.**

24. A purchaser of real property which was then in the actual possession of lessees, was charged with knowledge of any interest which they could establish.—*McKeen v. Brooks*, 483.

**RECEIPTS.**

**Wrongful delivery—Not evidence of payment,—see Trusts, 8.**

**RECEIVERS.**

**Mortgage Foreclosure—Sales of Land—*Caveat Emptor*.**

1. A receiver appointed in a mortgage foreclosure suit was an officer of the court, with authority limited by the terms of the decree, and anyone contracting with him did so at his peril.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**Same—Judicial Sale—Confirmation.**

2. A sale made by a receiver pursuant to a consent decree in a mortgage foreclosure suit instituted under section 6861, Revised Codes, is a judicial sale which does not require confirmation by the court in order to pass title to the purchaser.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**Judicial Sale—Warranting Title—Receivers—Excess of Power—Specific Performance.**

3. A receiver appointed under a decree in a foreclosure suit directing him to sell the property covered by the mortgage, was without authority to convey by warranty deed or contract to perfect the title if defective; a contract in this behalf, therefore, was not a proper subject for specific performance.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**Sales—Approval by Court.**

4. A court of equity has inherent power to withhold approval of a contract of sale of land, if the receiver in entering into it acted improvidently or inadvertently to the prejudice of the mortgagee.—*Interior Securities Co. v. Campbell, Receiver*, 459.

**RECORDATION OF INSTRUMENTS.**

**Recordation of instruments—When notice and when not,—see Real Property, 6.**

**Acknowledgment by Whom.**

1. To entitle an instrument to record, under section 4646, Rev. Codes, it must be acknowledged by the party who is bound by it to the performance of an act, acknowledgment by the party to whom he is bound being of no avail, and record of it in the latter case imparts no constructive notice whatever.—*Lee v. Laughery*, 238.

## RECORD ON APPEAL.

See, also, Bill of Exceptions.

Bill of exceptions—Certificate—Effect,—see Appeal and Error, 11.

Imports verity,—see Criminal Law, 35.

New trial notice—Presumption,—see Appeal and Error, 32.

Sufficiency,—see Appeal and Error, 8.

## RES ADJUDICATA.

See Injunction, 4.

## RESCISSION.

See Contracts, 2-6.

## RES GESTAE.

See Evidence, 19.

## RESIDENCE.

Corporations,—see Venue, 1-5.

Of creditor—Venue,—see Payment, 1; Venue, 1-5.

## RES IPSA LOQUITUR.

Inapplicability of doctrine,—see Personal Injuries, 10.

## SALES.

See Commissions; Contracts; Judicial Sales; Principal and Agent; Real Property.

## SCHOOLS AND SCHOOL DISTRICTS.

County high schools—Special elections,—see Elections, 1.

Teachers' Pensions—Statute—Constitutionality.

1. *Held*, that Chapter 95, Laws of 1915, providing for teachers' pensions, is not invalid as in contravention of sections 3 and 23 of Article III; section 26, Article V, and section 11, Article XII, of the state Constitution, nor as offending against the clauses of the federal Constitution prohibiting the taking of property without due process of law and denying the equal protection of the laws (Fifth and Fourteenth Amendments, U. S. Const.)—*Trumper v. School District No. 55*, 90.

Same—Validity of Act—Legislative Questions.

2. With economic defects and objections having to do with matters of detail in the scheme of teachers' pensions provided by Chapter 95, Laws of 1915, courts are not concerned, such considerations being for the legislature.—*Trumper v. School District No. 55*, 90.

School Districts—Creation—Petition—Sufficiency.

3. Petition for the creation of a new school district out of an existing one, under section 405, Chapter 76, Laws 1913, need not formally allege that the proposed new district is part of the one out of which it is sought to be created.—*State ex rel. Hall v. Peterson*, 355.

Same.

4. Failure of a petition of the nature of the above to recite that there was more than one schoolhouse in the district from which the new one was to be segregated, and that the petitioners resided within the confines of the latter, did not render it insufficient.—*State ex rel. Hall v. Peterson*, 355.

## Same—Petition—How to be Construed.

5. A petition for the creation of a new school district under section 405, Chapter 76, Laws 1913, is not a pleading the contents of which are subject to critical legal analysis to determine its sufficiency; but is sufficient to confer jurisdiction upon the board of school trustees if it clearly indicates the desire of a majority of the school electors residing in the proposed new district for segregation, and describes its boundaries.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Sufficiency.

6. Since section 405, *supra*, does not require that the notice of appeal from the decision of the board of trustees to the county superintendent of schools, or from the decision of the superintendent to the board of county commissioners, shall state that appellants are resident taxpayers, absence of such allegation does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Residence of Petitioners—How Determinable.

7. The residence of school electors who appeal from a decision of the superintendent of schools in the matter of their petition for a new school district, if called in question, must be determined by proof, not by assertion to that effect in their petition.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Failure to File—Effect.

8. Section 405, Chapter 76, Laws 1913, does not provide for filing of the notice of appeal required of school electors who are dissatisfied with a ruling of a county superintendent in the matter of the creation of a new school district; hence failure to file such notice with the clerk of the district or with the school board does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Creation—Appeal.

9. An appeal lies from the decision of the board of school trustees denying a petition for the creation of a new school district presented under section 405, Chapter 76, Laws 1913.—State ex rel. Hall v. Peterson, 355.

## Same—Appeal—Power of Board of County Commissioners.

10. Upon appeal to it from a decision of the county superintendent of schools denying a petition for the creation of a new school district, asked for under section 405, Chapter 76, Laws 1913, the board of county commissioners is vested with plenary power to create the district.—State ex rel. Hall v. Peterson, 355.

## SELF-DEFENSE.

See Criminal Law, 1, 17.

## SERVICE.

Of notice of intention—Timely service,—see New Trial, 3.

Of summons—Affidavit of person serving,—see Summons, 1.

## SOLDIERS.

Default judgment while defendant in military service,—see Judgments, 16, 17.

## SPECIAL ELECTIONS.

Failure to publish notice,—see Elections, 1.

## SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 14-22, 26-32.

## SPECIFIC PERFORMANCE.

## Receivers—Mortgage Foreclosure Sale—Actions.

1. *Quære*: May an independent action be maintained against a receiver appointed in a mortgage foreclosure suit, to compel him to specifically perform a contract of sale entered into by him as such?—Interior Securities Co. v. Campbell, Receiver, 459.

## Foreclosure Sale—Duty of Court.

2. In an action for specific performance of a contract of sale made by a receiver appointed in a mortgage foreclosure, the court must look to the real parties in interest and refuse relief if the contract was not just and reasonable, or if performance would operate more harshly upon the parties than its refusal would upon the plaintiff seeking performance.—Interior Securities Co. v. Campbell, Receiver, 459.

## Burden of Proof.

3. One who seeks specific performance of a contract of sale made by a receiver in a foreclosure suit, has the burden of showing that the contract was just and fair in all respects.—Interior Securities Co. v. Campbell, Receiver, 459.

## Equity—Duty of Plaintiff.

4. One seeking specific performance must come into court with clean hands and with a cause the ethical qualities of which are such as to commend it to the conscience of the chancellor.—Interior Securities Co. v. Campbell, Receiver, 459.

## Discretion.

5. Specific performance is not granted as a matter of abstract right, but the application therefor is addressed to the sound, legal discretion of the court, the exercise of which will not be interfered with on appeal in the absence of a clear showing of abuse thereof.—Interior Securities Co. v. Campbell, Receiver, 459.

## Judicial Sale—Warranting Title—Power of Receiver—Excess of Power.

6. A receiver appointed under a decree in a foreclosure suit directing him to sell the property covered by the mortgage, was without authority to convey by warranty deed or contract to perfect the title if defective; a contract in this behalf, therefore, was not a proper subject for specific performance.—Interior Securities Co. v. Campbell, Receiver, 459.

## STATE AUDITOR.

Member of Industrial Accident Board, holding two offices,—see Workmen's Compensation, 8.

## STATE BOARD OF EQUALIZATION.

See Taxation, 6-8.

## STATE BONDS.

See Taxation, 9-22.

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## STATUTES AND STATUTORY CONSTRUCTION.

See, also, Constitution.

Constitutionality of Workmen's Compensation Act,—see Workmen's Compensation.

Statutory Construction—Unexpressed Intention of Legislature—Effect.

1. A supposed unexpressed intention of the legislature in enacting a statute cannot override the clear import of the language employed by it. *Equitable Life Assurance Co. v. Hart*, 76.

Statutes—Repeal by Implication—General and Special Acts.

2. An Act special in character, followed by one of a general nature, is not to be considered as repealed by implication.—*Equitable Life Assurance Co. v. Hart*, 76.

What is not Defective Title.

3. A misplaced quotation mark in the title of an Act in referring to a statute to be repealed is not sufficient to render the Act invalid on the ground of a defective title.—*Equitable Life Assurance Co. v. Hart*, 76.

Taxation—License Fees—Insurance Corporations—Repeal of Statute.

4. *Held*, that section 4017, Revised Codes, requiring insurance corporations to pay certain license fees before commencing to do business in this state, was not impliedly repealed, nor expressly by the general repealing clause found in Chapter 79, Laws of 1917, imposing a further license fee of one per cent upon their net income.—*Equitable Life Assurance Co. v. Hart*, 76.

Statutes—"Special," "Private" and "Local" Acts.

5. A "special" or "private" Act is one operating only on particular persons and private concerns; a "local" Act is one applicable only to a particular part of the legislative jurisdiction.—*Trumper v. School District No. 55*, 76.

Validity—Legislative Questions.

6. With economic defects and objections having to do with matters of detail in the scheme of teachers' pensions provided by Chapter 95, Laws of 1915, courts are not concerned, such considerations being for the legislature.—*Trumper v. School District No. 55*, 76.



**Cities and Towns—Gas—Regulation of Rates—Statutory Construction.**

7. *Held*, that the concluding sentence of section 12 of the Act of 1913, to wit: "This, however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts," refers to the sentence immediately preceding—which forbids rebates, concessions, etc., and was not intended to except from the operation of the Act rate contracts made between cities and public utilities prior to its passage.—State ex rel. City of Billings v. Billings Gas Co., 102.

**Statutes—Construction—Rule.**

8. Whenever the language of a statute is plain, simple, direct and unambiguous, it does not require construction—it construes itself.—Cruse v. Fischl, 258.

**Federal Employers' Liability Act—Federal Question.**

9. The construction of the federal Employers' Liability Act involves a federal question, with respect to which the decisions of the United States supreme court are conclusive upon state courts.—Matti v. Chicago, Mil. & St. Paul Ry. Co., 280.

**Criminal Law—County Attorney—Opening Statement—Statute—Directory Provision.**

10. The provision of section 9271, Revised Codes, requiring the county attorney to make an opening statement in a prosecution for crime, held directory merely.—State v. Hall, 182.

**Elections—Primary Election Law—County Central Committee—Power to Make Original Nomination.**

11. *Held*, that neither section 16 nor section 32 of the Primary Election Law (Laws of 1913, p. 570) empowers a county central committee to make an original nomination of a candidate to an office to be filled at a special election, the officer-elect having died soon after election and before induction into office.—State ex rel. Smith v. Duncan, 376.

**Statutes and Statutory Construction—Title—Evidence of What.**

12. The title of a statute is indicative of the legislative intent in passing it.—State ex rel. Smith v. Duncan, 376.

**Same—Rule.**

13. A statute must be construed in its entirety, and, if possible, meaning must be given to every word, phrase, sentence and section, the presumption being that the legislature did not employ language without meaning.—State ex rel. Smith v. Duncan, 376.

**Statutes—Adoption from Other State—Presumptions.**

14. When a statute is adopted from another state, the presumption is that the legislature adopts the interpretation placed upon it by the highest court of the state from which it is adopted.—Moreland v. Monarch Min. Co., 419.

**Taxation—Bank Stock—Statute—Invalidity.**

15. *Held*, that Chapter 31, Laws of 1915, amendatory of sections 2503-2505, Revised Codes, prescribing the mode of assessment of bank stocks, is invalid in so far as it provides that the assessed (instead of the actual) valuation of the bank's real estate shall be deducted from the total value of its capital stock, surplus and undivided profits.—Dennis v. First Nat. Bank, 448.

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16. An Act which does not assume to be an amendment nor re-enact that portion of a prior statute claimed to be amended by it, does not, under section 25, Article V, of the Constitution, have the effect of an amendment.—State v. Centennial Brewing Co., 500.

**Statutory Construction—Rules of Grammar.**

17. The rule of grammatical construction is an aid in the interpretation of statutes, which, however, must give way if the text of the

statute indicates a legislative intention contrary to that which would follow from an application of the rules of grammar.—*State v. Centennial Brewing Co.*, 500.

**Same—Doctrine of "Last Antecedent."**

18. Under the doctrine of the "last antecedent" resorted to in aid of the interpretation of statutes, a relative clause must be construed to relate to the nearest antecedent that will make sense, unless extension to others more remote is required to arrive at the true purpose of the legislature.—*State v. Centennial Brewing Co.*, 500.

**Same—Duty of Courts.**

19. In construing statutes, courts cannot substitute judicial opinion of expediency for the will of the legislature.—*State v. Centennial Brewing Co.*, 500.

**Statutes—Who may not Assail.**

20. One not injured by the provisions of an Act deemed by him unconstitutional is not in position to assail it.—*Shea v. North-Butte Mining Co.*, 522.

**Same—Part Valid and Part Invalid—Effect.**

21. Where, after elimination of that portion of a statute which is invalid, sufficient remains to render it operative and reasonably effective to carry out the main purpose of the legislature in enacting it, courts must to that extent uphold it.—*Shea v. North-Butte Mining Co.*, 522.

**Estates of Deceased Persons—Conversion—Right of Action in Heir.**

22. *Held*, that section 6462, Revised Codes, authorizing an heir, who at the time of a wrongful conversion of personal property of his testator or intestate was laboring under a disability, to bring his action for damages within five years after the cessation of such disability, acts on the remedy only and does not create a new cause of action nor operate retroactively.—*Haydon v. Normandin*, 539.

**Statutory Construction—History—Arrangement in Code—Effect.**

23. The history of a statute, as well as its arrangement under a proper heading in the Codes upon its adoption from another state, is some evidence of the purpose of the legislature in enacting it.—*Haydon v. Normandin*, 539.

**Same—Adoption of Act from Other State—Rule.**

24. Where a statute is adopted from another state after construction by its highest court, the construction thus placed upon it is adopted with it.—*Haydon v. Normandin*, 539.

**Penal Statutes—Strict Construction.**

25. A penal statute cannot be extended by implication beyond the legitimate import of the words used therein, so as to embrace cases or acts not clearly described by them.—*State v. Lutey Bros.*, 545.

**Trading Stamp Act—Stamps Redeemable in Cash—Not Included in Act.**

26. *Held*, that Chapter 17, Laws of 1917, regulating the giving of stamps, coupons, etc., by merchants with articles of merchandise sold by them, and providing a penalty for a violation of the Act, does not prohibit the use of trading stamps which are redeemable in cash only. *State v. Lutey Bros.*, 545.

**Default Judgment—Defendant in Military Service—Purpose of Act.**

27. *Held*, that the purpose of section 4 (a) *et seq.* of Chapter 8, Laws Extra Session, 1918, is to delay entry of judgment in any case where defendant has defaulted, until the court has taken such measures and made such requirements of the plaintiffs as will furnish the defendant with protection against the enforcement of a judgment which may injuriously affect him or his interests, while he is absent in military service.—*State ex rel. Smith v. District Court*, 602.

## STATUTES OF LIMITATION.

Conversion of property of intestate—Right of action in heir,—see Descent and Distribution, 1-3.

## Nature and Purpose.

1. Statutes of limitation are statutes of repose, their object being to suppress stale and fraudulent claims after the evidence of their payment has been lost, or the facts concerning them have become obscure from lapse of time or the defective memory, or death or removal of witnesses.—*Eby v. City of Lewistown*, 113.

## STOCK AND STOCKHOLDERS.

See Corporations, 1-7; Bills and Notes, 14.

Bank stock—Taxation,—see Taxation, 24-26.

## STREETS AND HIGHWAYS.

Changing grade—Measure of damages,—see Cities and Towns, 15.

Easements in land for street purposes,—see Cities and Towns, 23-25.

Use of streets for laying gas-pipes—Franchise,—see Cities and Towns, 1-8.

## SUMMONS.

## Affidavit of Person Serving—Contents.

1. Section 6518, Revised Codes, does not require that the affidavit of the person making service of a summons must contain the statement that he was not a party to the action and was over the age of eighteen years.—*State ex rel. Smith v. District Court*, 602.

## SUPERVISORY CONTROL.

See Venue, 1-5.

## SURPLUSAGE.

Allegation of title to realty in complaint for injunction,—see Pleading and Practice, 12.

Unnecessary recitals in judgment,—see Appeal and Error, 12.

## TAXATION.

Special improvement taxes,—see Cities and Towns, 14-22, 26-32.

Taxes paid by special administrator on trust property—When not recoverable,—see Executors and Administrators, 10.

## License Fees—Insurance Corporations—Statutes.

1. *Held*, that, the purpose of Chapter 79, Laws of 1917, being the imposition of a license fee of one per cent upon the net income of every corporation in the state for the privilege of doing business as such, without regard to the character of the business, insurance corporations were intended to be within its purview.—*Equitable Life Assurance Co. v. Hart*, 76.

## Same—Insurance Corporations—Repeal of Statute.

2. *Held*, that section 4017, Revised Codes, requiring insurance corporations to pay certain license fees before commencing to do business in this state, was not impliedly repealed, nor by the general repealing clause found in Chapter 79, Laws of 1917, imposing a further license fee of one per cent upon their net income.—*Equitable Life Assurance Co. v. Hart*, 76.

## Same—Double Taxation.

3. The license fee required of insurance corporations by section 4017 and that exacted by Chapter 79, Laws of 1917, *held* not to con-

**RECORD ON APPEAL.**

See, also, Bill of Exceptions.

Bill of exceptions—Certificate—Effect,—see Appeal and Error, 11.

Imports verity,—see Criminal Law, 35.

New trial notice—Presumption,—see Appeal and Error, 32.

Sufficiency,—see Appeal and Error, 8.

**RES ADJUDICATA.**

See Injunction, 4.

**RESCISSION.**

See Contracts, 2-6.

**RES GESTAE.**

See Evidence, 19.

**RESIDENCE.**

Corporations,—see Venue, 1-5.

Of creditor—Venue,—see Payment, 1; Venue, 1-5.

**RES IPSA LOQUITUR.**

Inapplicability of doctrine,—see Personal Injuries, 10.

**SALES.**

See Commissions; Contracts; Judicial Sales; Principal and Agent; Real Property.

**SCHOOLS AND SCHOOL DISTRICTS.**

County high schools—Special elections,—see Elections, 1.

Teachers' Pensions—Statute—Constitutionality.

1. *Held*, that Chapter 95, Laws of 1915, providing for teachers' pensions, is not invalid as in contravention of sections 3 and 23 of Article III; section 26, Article V, and section 11, Article XII, of the state Constitution, nor as offending against the clauses of the federal Constitution prohibiting the taking of property without due process of law and denying the equal protection of the laws (Fifth and Fourteenth Amendments, U. S. Const.)—*Trumper v. School District No. 55*, 90.

Same—Validity of Act—Legislative Questions.

2. With economic defects and objections having to do with matters of detail in the scheme of teachers' pensions provided by Chapter 95, Laws of 1915, courts are not concerned, such considerations being for the legislature.—*Trumper v. School District No. 55*, 90.

School Districts—Creation—Petition—Sufficiency.

3. Petition for the creation of a new school district out of an existing one, under section 405, Chapter 76, Laws 1913, need not formally allege that the proposed new district is part of the one out of which it is sought to be created.—*State ex rel. Hall v. Peterson*, 355.

Same.

4. Failure of a petition of the nature of the above to recite that there was more than one schoolhouse in the district from which the new one was to be segregated, and that the petitioners resided within the confines of the latter, did not render it insufficient.—*State ex rel. Hall v. Peterson*, 355.

## Same—Petition—How to be Construed.

5. A petition for the creation of a new school district under section 405, Chapter 76, Laws 1913, is not a pleading the contents of which are subject to critical legal analysis to determine its sufficiency; but is sufficient to confer jurisdiction upon the board of school trustees if it clearly indicates the desire of a majority of the school electors residing in the proposed new district for segregation, and describes its boundaries.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Sufficiency.

6. Since section 405, *supra*, does not require that the notice of appeal from the decision of the board of trustees to the county superintendent of schools, or from the decision of the superintendent to the board of county commissioners, shall state that appellants are resident taxpayers, absence of such allegation does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Residence of Petitioners—How Determinable.

7. The residence of school electors who appeal from a decision of the superintendent of schools in the matter of their petition for a new school district, if called in question, must be determined by proof, not by assertion to that effect in their petition.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Failure to File—Effect.

8. Section 405, Chapter 76, Laws 1913, does not provide for filing of the notice of appeal required of school electors who are dissatisfied with a ruling of a county superintendent in the matter of the creation of a new school district; hence failure to file such notice with the clerk of the district or with the school board does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Creation—Appeal.

9. An appeal lies from the decision of the board of school trustees denying a petition for the creation of a new school district presented under section 405, Chapter 76, Laws 1913.—State ex rel. Hall v. Peterson, 355.

## Same—Appeal—Power of Board of County Commissioners.

10. Upon appeal to it from a decision of the county superintendent of schools denying a petition for the creation of a new school district, asked for under section 405, Chapter 76, Laws 1913, the board of county commissioners is vested with plenary power to create the district.—State ex rel. Hall v. Peterson, 355.

## SELF-DEFENSE.

See Criminal Law, 1, 17.

## SERVICE.

Of notice of intention—Timely service,—see New Trial, 8.

Of summons—Affidavit of person serving,—see Summons, 1.

## SOLDIERS.

Default judgment while defendant in military service,—see Judgments, 16, 17.

## SPECIAL ELECTIONS.

Failure to publish notice,—see Elections, 1.

## SPECIAL IMPROVEMENT DISTRICTS.

See Cities and Towns, 14–22, 26–32.

## SPECIFIC PERFORMANCE.

## Receivers—Mortgage Foreclosure Sale—Actions.

1. *Quære*: May an independent action be maintained against a receiver appointed in a mortgage foreclosure suit, to compel him to specifically perform a contract of sale entered into by him as such?—Interior Securities Co. v. Campbell, Receiver, 459.

## Foreclosure Sale—Duty of Court.

2. In an action for specific performance of a contract of sale made by a receiver appointed in a mortgage foreclosure, the court must look to the real parties in interest and refuse relief if the contract was not just and reasonable, or if performance would operate more harshly upon the parties than its refusal would upon the plaintiff seeking performance.—Interior Securities Co. v. Campbell, Receiver, 459.

## Burden of Proof.

3. One who seeks specific performance of a contract of sale made by a receiver in a foreclosure suit, has the burden of showing that the contract was just and fair in all respects.—Interior Securities Co. v. Campbell, Receiver, 459.

## Equity—Duty of Plaintiff.

4. One seeking specific performance must come into court with clean hands and with a cause the ethical qualities of which are such as to commend it to the conscience of the chancellor.—Interior Securities Co. v. Campbell, Receiver, 459.

## Discretion.

5. Specific performance is not granted as a matter of abstract right, but the application therefor is addressed to the sound, legal discretion of the court, the exercise of which will not be interfered with on appeal in the absence of a clear showing of abuse thereof.—Interior Securities Co. v. Campbell, Receiver, 459.

## Judicial Sale—Warranting Title—Power of Receiver—Excess of Power.

6. A receiver appointed under a decree in a foreclosure suit directing him to sell the property covered by the mortgage, was without authority to convey by warranty deed or contract to perfect the title if defective; a contract in this behalf, therefore, was not a proper subject for specific performance.—Interior Securities Co. v. Campbell, Receiver, 459.

## STATE AUDITOR.

Member of Industrial Accident Board, holding two offices,—see Workmen's Compensation, 8.

## STATE BOARD OF EQUALIZATION.

See Taxation, 6-8.

## STATE BONDS.

See Taxation, 9-22.

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**Contracts—Insurance—Place of Payment—Change of.**

2. *Held*, on supervisory control, under the rule above that where a contract of indemnity did not designate any specific place for payment in case of loss to the insured, defendant company was required to make payment at the place of business or residence of the insured, and that therefore the county wherein such place was situate was the place of trial of an action by the insured to recover for loss sustained, and motion for change of venue to the county of defendant surety company's residence was properly denied.—*State ex rel. Western A. & I. Co. v. District Court*, 330.

**Change of—Domestic Corporations—Residence.**

3. When the question arises in an action in which a domestic corporation is a party, whether or not a change of venue shall be had, the principal place of business of the corporation is its residence.—*State ex rel. Western A. & I. Co. v. District Court*, 330.

**Same—Burden of Proof.**

4. The burden of showing that a place other than the residence of plaintiff was agreed upon as the place where payment should be made under a contract of indemnity, was upon defendant company on its motion for a change of venue to the county of its residence.—*State ex rel. Western A. & I. Co. v. District Court*, 330.

**Same—Affidavits—Conclusions.**

5. Statements in affidavits filed by defendant indemnity company in support of its motion for a change of venue, to the effect that the contract of indemnity sued upon was to be performed by making payment at its home office, *held* legal conclusions and without evidentiary value.—*State ex rel. Western A. & I. Co. v. District Court*, 330.

## VERDICTS.

On conflicting evidence—Affirmance,—see *Appeal and Error*, 1, 6, 16, 18.

When court may direct,—see *Bills and Notes*, 10.

**Inkeepers—Ejection of Guest—Excessive Verdict.**

1. *Held*, that a verdict of \$500 against a hotel-keeper and his wife jointly as compensatory damages for wrongfully ejecting plaintiff from her room and the house at night, and \$250 against the wife as exemplary damages, was not excessive.—*Jones v. Shannon*, 225.

**Equity—Jury Trial—Special Findings—General Verdict.**

2. Where a jury is called in an equity case to assist in the determination of controverted questions of fact, the trial judge should not submit a general verdict to them, but require them to make special findings in response to interrogatories propounded.—*Wilcox v. Schissler*, 246.

**When Against Law.**

3. A verdict which is contrary to the instructions, is contrary to law.—*De Young v. Benepe*, 306.

**Criminal Law—Verdict of Acquittal—Refusal to Direct—When Proper.**

4. Refusal to direct a verdict of acquittal was proper where the evidence was sufficient, as matter of law, to prove every element necessary to constitute the crime of rape.—*State v. Tate*, 343.

**Same—Directed Verdict of Acquittal—When Proper.**

5. Under Section 9297, Revised Codes, the district court may, in its discretion, advise, but not direct or compel, the jury to acquit if it deems the evidence to be clearly insufficient in weight to justify a verdict of guilty.—*State v. Tate*, 343.

**Remission and Entry—Striking from Files—Power of District Court.**

6. After a verdict, which was neither informal nor insufficient (*Rev. Codes*, sec. 6756), had been received and recorded, the trial



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therefore does not carry with it the right to enlarge the ditch, change its course materially, or make a new ditch over the land.—*Babcock v. Gregg*, 317.

Same—Abandonment.

4. An easement for a right of way for an irrigating ditch may be lost by abandonment.—*Babcock v. Gregg*, 317.

Same—Exchange by Parol Agreement—Nature of Transaction.

5. Where an easement for a ditch used to irrigate a large tract of land, after acquisition by prescription over town lots was abandoned by parol agreement of the parties for one over the same property but more advantageous to the lot owner, which agreement was fully executed, the transaction held to have been an exchange of one easement for the other, and not to have resulted in a license, revocable at the will of the licensor.—*Babcock v. Gregg*, 317.

Ditches—Interference—Injunction—Title—Complaint—Surplusage.

6. In a suit for an injunction to restrain interference with an irrigating ditch and to compel removal of an obstruction placed therein by defendant, plaintiff need not plead the character of title by which he holds the right of way for his ditch; where he does so, the allegation may be treated as surplusage.—*Babcock v. Gregg*, 317.

Same—Pleading—Surplusage—Appeal—Theory of Case.

7. Plaintiff's allegation that he acquired title to a ditch by prescription having been surplusage, he was not estopped, on the ground of inconsistency, to assert on appeal that he obtained title by exchange of one ditch for another.—*Babcock v. Gregg*, 317.

Ditches—Easements—Extent of User—Evidence.

8. The extent of an easement acquired by adverse user is measured by the extent of the use; hence evidence of the amount of water which had been or could be used through a ditch, title to which rested upon prescription, was admissible.—*Lowry v. Carrier*, 392.

Same—Public Lands—Easements.

9. Entrymen on public lands over which irrigating ditches had theretofore been constructed under the right conferred by sections 2339 and 2340, United States Revised Statutes, take the lands burdened with the easement thus granted.—*Lowry v. Carrier*, 392.

Same—Nonuser—Abandonment—Evidence.

10. Evidence of limited use or nonuser of an irrigating ditch is not alone sufficient to establish abandonment.—*Lowry v. Carrier*, 392.

Same—Pleading—Complaint—Incompatible Theories.

11. A party may in his complaint present his claim to the use of irrigating ditches in different counts, each founded upon a different theory to meet the exigencies of the case as disclosed by the evidence, provided the theories are not incompatible.—*Lowry v. Carrier*, 392.

Same—Adverse Possession—Prescription—Incompatible Theories.

12. Since use of one's own property cannot be "adverse" within the meaning of that term as used in the law of prescription, assertion of title to an easement over public lands granted by the federal government under sections 2339 and 2340, United States Revised Statutes, for ditch purposes, and claim of the same right under title by prescription thereafter acquired were incompatible, in the absence of abandonment.—*Lowry v. Carrier*, 392.

Same—Equity Cases—Review.

13. Under section 6253, Revised Codes, the supreme court will in an equity case, the decree in which was founded upon incompatible theories, dispose of the cause on its merits, all the evidence being presented in the record, by eliminating from the decree findings based upon the

**Cities and Towns—Gas—Regulation of Rates—Statutory Construction.**

7. *Held*, that the concluding sentence of section 12 of the Act of 1913, to wit: "This, however, does not have the effect of suspending, rescinding, invalidating or in any way affecting existing contracts," refers to the sentence immediately preceding—which forbids rebates, concessions, etc., and was not intended to except from the operation of the Act rate contracts made between cities and public utilities prior to its passage.—State ex rel. City of Billings v. Billings Gas Co., 102.

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**Statutory Construction—Rules of Grammar.**

17. The rule of grammatical construction is an aid in the interpretation of statutes, which, however, must give way if the text of the

statute indicates a legislative intention contrary to that which would follow from an application of the rules of grammar.—*State v. Centennial Brewing Co.*, 500.

**Same—Doctrine of "Last Antecedent."**

18. Under the doctrine of the "last antecedent" resorted to in aid of the interpretation of statutes, a relative clause must be construed to relate to the nearest antecedent that will make sense, unless extension to others more remote is required to arrive at the true purpose of the legislature.—*State v. Centennial Brewing Co.*, 500.

**Same—Duty of Courts.**

19. In construing statutes, courts cannot substitute judicial opinion of expediency for the will of the legislature.—*State v. Centennial Brewing Co.*, 500.

**Statutes—Who may not Assail.**

20. One not injured by the provisions of an Act deemed by him unconstitutional is not in position to assail it.—*Shea v. North-Butte Mining Co.*, 522.

**Same—Part Valid and Part Invalid—Effect.**

21. Where, after elimination of that portion of a statute which is invalid, sufficient remains to render it operative and reasonably effective to carry out the main purpose of the legislature in enacting it, courts must to that extent uphold it.—*Shea v. North-Butte Mining Co.*, 522.

**Estates of Deceased Persons—Conversion—Right of Action in Heir.**

22. *Held*, that section 6462, Revised Codes, authorizing an heir, who at the time of a wrongful conversion of personal property of his testator or intestate was laboring under a disability, to bring his action for damages within five years after the cessation of such disability, acts on the remedy only and does not create a new cause of action nor operate retroactively.—*Haydon v. Normandin*, 539.

**Statutory Construction—History—Arrangement in Code—Effect.**

23. The history of a statute, as well as its arrangement under a proper heading in the Codes upon its adoption from another state, is some evidence of the purpose of the legislature in enacting it.—*Haydon v. Normandin*, 539.

**Same—Adoption of Act from Other State—Rule.**

24. Where a statute is adopted from another state after construction by its highest court, the construction thus placed upon it is adopted with it.—*Haydon v. Normandin*, 539.

**Penal Statutes—Strict Construction.**

25. A penal statute cannot be extended by implication beyond the legitimate import of the words used therein, so as to embrace cases or acts not clearly described by them.—*State v. Lutey Bros.*, 545.

**Trading Stamp Act—Stamps Redeemable in Cash—Not Included in Act.**

26. *Held*, that Chapter 17, Laws of 1917, regulating the giving of stamps, coupons, etc., by merchants with articles of merchandise sold by them, and providing a penalty for a violation of the Act, does not prohibit the use of trading stamps which are redeemable in cash only. *State v. Lutey Bros.*, 545.

**Default Judgment—Defendant in Military Service—Purpose of Act.**

27. *Held*, that the purpose of section 4 (a) *et seq.* of Chapter 8, Laws Extra Session, 1918, is to delay entry of judgment in any case where defendant has defaulted, until the court has taken such measures and made such requirements of the plaintiffs as will furnish the defendant with protection against the enforcement of a judgment which may injuriously affect him or his interests, while he is absent in military service.—*State ex rel. Smith v. District Court*, 602.

## STATUTES OF LIMITATION.

Conversion of property of intestate—Right of action in heir,—see Descent and Distribution, 1-3.

## Nature and Purpose.

1. Statutes of limitation are statutes of repose, their object being to suppress stale and fraudulent claims after the evidence of their payment has been lost, or the facts concerning them have become obscure from lapse of time or the defective memory, or death or removal of witnesses.—*Eby v. City of Lewistown*, 113.

## STOCK AND STOCKHOLDERS.

See Corporations, 1-7; Bills and Notes, 14.

Bank stock—Taxation,—see Taxation, 24-26.

## STREETS AND HIGHWAYS.

Changing grade—Measure of damages,—see Cities and Towns, 15.

Easements in land for street purposes,—see Cities and Towns, 23-25.

Use of streets for laying gas-pipes—Franchise,—see Cities and Towns, 1-8.

## SUMMONS.

## Affidavit of Person Serving—Contents.

1. Section 6518, Revised Codes, does not require that the affidavit of the person making service of a summons must contain the statement that he was not a party to the action and was over the age of eighteen years.—*State ex rel. Smith v. District Court*, 602.

## SUPERVISORY CONTROL.

See Venue, 1-5.

## SURPLUSAGE.

Allegation of title to realty in complaint for injunction,—see Pleading and Practice, 12.

Unnecessary recitals in judgment,—see Appeal and Error, 12.

## TAXATION.

Special improvement taxes,—see Cities and Towns, 14-22, 26-32.

Taxes paid by special administrator on trust property—When not recoverable,—see Executors and Administrators, 10.

## License Fees—Insurance Corporations—Statutes.

1. *Held*, that, the purpose of Chapter 79, Laws of 1917, being the imposition of a license fee of one per cent upon the net income of every corporation in the state for the privilege of doing business as such, without regard to the character of the business, insurance corporations were intended to be within its purview.—*Equitable Life Assurance Co. v. Hart*, 76.

## Same—Insurance Corporations—Repeal of Statute.

2. *Held*, that section 4017, Revised Codes, requiring insurance corporations to pay certain license fees before commencing to do business in this state, was not impliedly repealed, nor by the general repealing clause found in Chapter 79, Laws of 1917, imposing a further license fee of one per cent upon their net income.—*Equitable Life Assurance Co. v. Hart*, 76.

## Same—Double Taxation.

3. The license fee required of insurance corporations by section 4017 and that exacted by Chapter 79, Laws of 1917, *held* not to con-

**RECORD ON APPEAL.**

See, also, Bill of Exceptions.

Bill of exceptions—Certificate—Effect,—see Appeal and Error, 11.

Imports verity,—see Criminal Law, 35.

New trial notice—Presumption,—see Appeal and Error, 32.

Sufficiency,—see Appeal and Error, 8.

**RES ADJUDICATA.**

See Injunction, 4.

**RESCISSION.**

See Contracts, 2-6.

**RES GESTAE.**

See Evidence, 19.

**RESIDENCE.**

Corporations,—see Venue, 1-5.

Of creditor—Venue,—see Payment, 1; Venue, 1-5.

**RES IPSA LOQUITUR.**

Inapplicability of doctrine,—see Personal Injuries, 10.

**SALES.**

See Commissions; Contracts; Judicial Sales; Principal and Agent; Real Property.

**SCHOOLS AND SCHOOL DISTRICTS.**

County high schools—Special elections,—see Elections, 1.

Teachers' Pensions—Statute—Constitutionality.

1. *Held*, that Chapter 95, Laws of 1915, providing for teachers' pensions, is not invalid as in contravention of sections 3 and 23 of Article III; section 26, Article V, and section 11, Article XII, of the state Constitution, nor as offending against the clauses of the federal Constitution prohibiting the taking of property without due process of law and denying the equal protection of the laws (Fifth and Fourteenth Amendments, U. S. Const.)—*Trumper v. School District No. 55*, 90.

Same—Validity of Act—Legislative Questions.

2. With economic defects and objections having to do with matters of detail in the scheme of teachers' pensions provided by Chapter 95, Laws of 1915, courts are not concerned, such considerations being for the legislature.—*Trumper v. School District No. 55*, 90.

School Districts—Creation—Petition—Sufficiency.

3. Petition for the creation of a new school district out of an existing one, under section 405, Chapter 76, Laws 1913, need not formally allege that the proposed new district is part of the one out of which it is sought to be created.—*State ex rel. Hall v. Peterson*, 355.

Same.

4. Failure of a petition of the nature of the above to recite that there was more than one schoolhouse in the district from which the new one was to be segregated, and that the petitioners resided within the confines of the latter, did not render it insufficient.—*State ex rel. Hall v. Peterson*, 355.

## Same—Petition—How to be Construed.

5. A petition for the creation of a new school district under section 405, Chapter 76, Laws 1913, is not a pleading the contents of which are subject to critical legal analysis to determine its sufficiency; but is sufficient to confer jurisdiction upon the board of school trustees if it clearly indicates the desire of a majority of the school electors residing in the proposed new district for segregation, and describes its boundaries.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Sufficiency.

6. Since section 405, *supra*, does not require that the notice of appeal from the decision of the board of trustees to the county superintendent of schools, or from the decision of the superintendent to the board of county commissioners, shall state that appellants are resident taxpayers, absence of such allegation does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Residence of Petitioners—How Determinable.

7. The residence of school electors who appeal from a decision of the superintendent of schools in the matter of their petition for a new school district, if called in question, must be determined by proof, not by assertion to that effect in their petition.—State ex rel. Hall v. Peterson, 355.

## Same—Notice of Appeal—Failure to File—Effect.

8. Section 405, Chapter 76, Laws 1913, does not provide for filing of the notice of appeal required of school electors who are dissatisfied with a ruling of a county superintendent in the matter of the creation of a new school district; hence failure to file such notice with the clerk of the district or with the school board does not render the appeal ineffectual.—State ex rel. Hall v. Peterson, 355.

## Same—Creation—Appeal.

9. An appeal lies from the decision of the board of school trustees denying a petition for the creation of a new school district presented under section 405, Chapter 76, Laws 1913.—State ex rel. Hall v. Peterson, 355.

## Same—Appeal—Power of Board of County Commissioners.

10. Upon appeal to it from a decision of the county superintendent of schools denying a petition for the creation of a new school district, asked for under section 405, Chapter 76, Laws 1913, the board of county commissioners is vested with plenary power to create the district.—State ex rel. Hall v. Peterson, 355.

## SELF-DEFENSE.

See Criminal Law, 1, 17.

## SERVICE.

Of notice of intention—Timely service,—see New Trial, 3.

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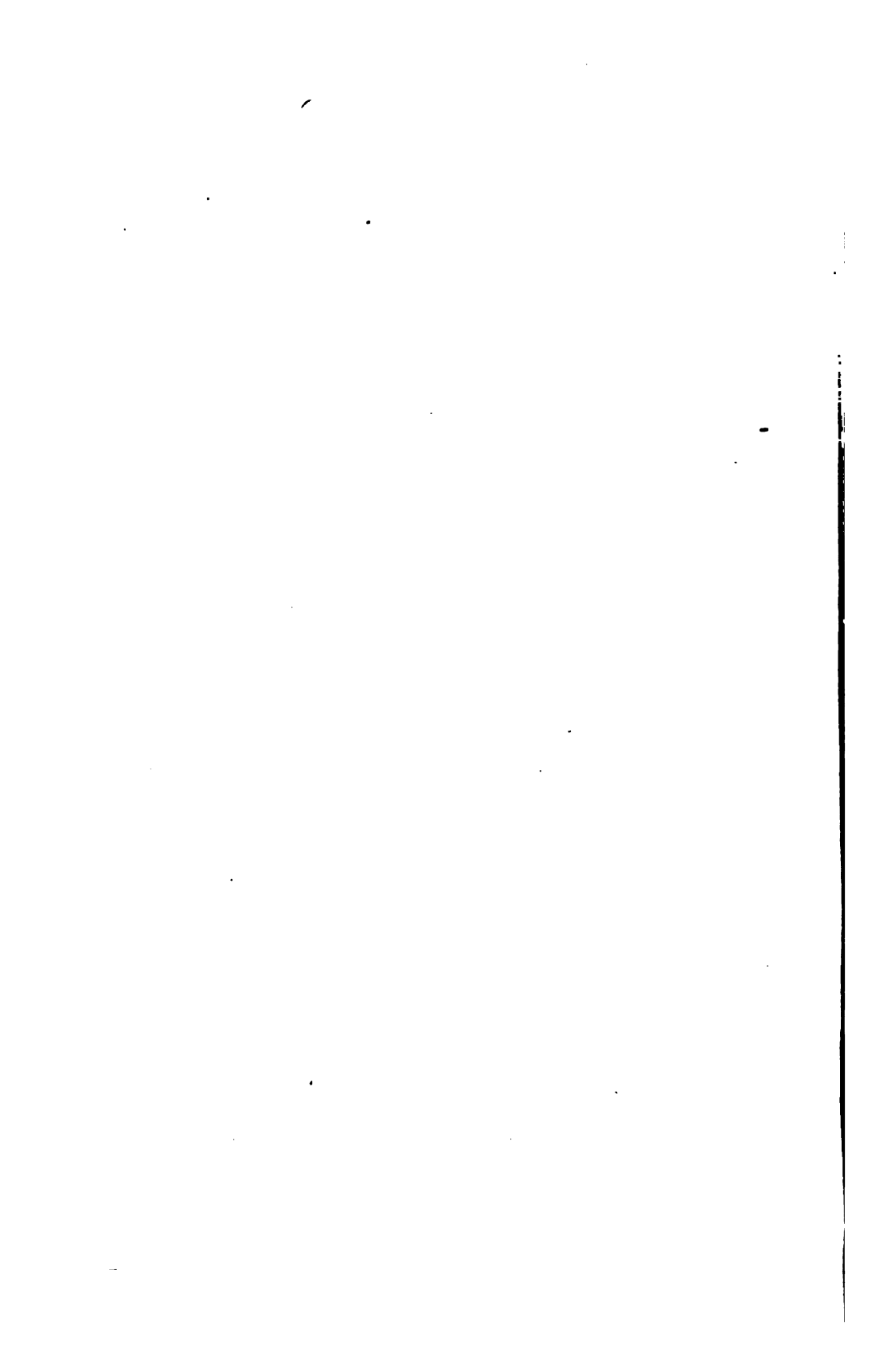
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## SPECIAL ELECTIONS.

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